

LEGAL REFORM IN INDONESIA

Final Report

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## EXECUTIVE SUMMARY

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### A. Purpose

The mission contracted with Chemonics International Inc. to provide a team of consultants to assess potential opportunities for supporting legal reform in Indonesia through a program with government and public sector entities. Where viable opportunities existed, the team identified subject matter areas and specific activities for mission assistance. The mission was particularly interested in determining the government's political will to support legal reform to justify the mission's investment of resources in a new project.

The project would be in addition to a program the mission is currently implementing with NGOs. This program focuses on developing civil society through strengthening selected democratic institutions. The new project can include activities extended from the ELIPS project, scheduled to run through September 1998. Any new work must take into account the limited resources available to the mission for this purpose and USAID's current plans to phase out the mission over the next five years.

### B. Process

Chemonics provided a core assessment team of four lawyers: two U.S. lawyers resident in the United States with substantial development assistance in various countries, one U.S. lawyer resident in Indonesia with 10 years of experience in-country in commercial law and related matters, and one Indonesian lawyer with extensive connections throughout the Indonesian legal sector and experience in managing a variety of public interest activities. The U.S.-based assessment team members conducted interviews with U.S.-based organizations and individuals familiar with Indonesia's political and legal development. Between November 12 and December 17, the assessment team conducted interviews in Jakarta with a wide variety of individuals in government legal organizations, NGOs, and the academic and private legal communities. Altogether, 68 persons were interviewed in the United States and Indonesia, in addition to mission personnel.

Mission representatives participated in nearly all interviews conducted in Indonesia. The assessment team and the mission agreed on a preliminary field work plan shortly after the team's arrival in Indonesia. A revised field work plan was agreed upon approximately two weeks later. An electronic version of the draft "Report of the Conclusions of the Field Assessment" was submitted to the mission for review and comment on December 31, 1997, and re-submitted on January 5, 1998. Comments from the mission were received until January 23, 1998, and were taken into account in preparing this report.

### C. Methodology

The mission and the assessment team determined that potential activities would likely involve topics previously addressed under the mission's ELIPS project, operating since 1992, and recommendations contained in the Diagnostic Assessment of Legal Development in Indonesia, prepared under BAPPENAS' direction with World Bank funding. A BAPPENAS-supported seminar in September 1997 focused attention on the diagnostic assessment, issued in March 1997. The assessment and ELIPS focused on public sector needs and operations, specifically within the government and public universities, and emphasized the need for modernization and reform within the Indonesian legal system to meet the demands of globalization.

The assessment team's work was complicated by several factors. BAPPENAS was scheduled to prepare an action plan for carrying out the diagnostic assessment recommendations; however, the action plan was not completed when field work began. Nor did team have access to preliminary drafts of the action plan. To further complicate the situation, the Guidelines for State Policy—the guidelines for the Indonesian government's new five year plan—were in their early stages. The upcoming presidential and vice presidential elections in March 1998, and likely changes in policy officials in April 1998, seemed to make officials less willing to commit resources to future legal reform efforts. A critical factor was the country's worsening financial crisis, which made the future direction of Indonesia's politics uncertain.

#### **D. Conclusions and Suggestions**

Assessment team members disagreed on the government's level of political will to achieve legal reform. They were therefore unable to conclude with certainty that efforts to prepare a new project focusing on government activities was justified. However, assessment team members agreed that the issue of the government's political will was less relevant to possible activities with universities, although such activities raised important feasibility issues.

**Insufficient political will.** Team members concluding that the government lacks the requisite political will pointed to the following factors:

- Weak government performance on legal reform during the current five-year plan
- An apparent lack of government strategy or approach to legal reform at the political level
- Continuing inadequate budget support for important legal sector activities
- A widespread view in the private sector that the government lacks interest in supporting legal reform
- Uncertainty among relevant public sector officials on future support
- A lack of attention to BAPPENAS diagnostic assessment recommendations

Team members holding these views recognized that pressures from abroad could help build support for legal reform; however, they saw no evidence that the government had responded in this fashion to outside pressures in the past. Given this, the team members doubted that government support could be ensured for particular activities. Achieving a lasting impact would be doubtful, even for successful activities, given the absence of a broader approach to legal reform. To underscore this concern, the team members pointed to USAID's experience in other Asian countries and USAID/Washington's policy directives.

These team members concluded that the current transition, including the change in government policy personnel in April 1998, and the start of a new planning period, made it impossible to predict the future government's future position on legal reform. They advised delaying further consideration of activities with the government until the spring of 1998 at the earliest. At that point, the team members said, USAID would need firm indications that the government had strengthened its commitment to legal reform and would have to obtain prior commitments from the government before embarking on new initiatives. These team members were more willing to consider activities with public universities, but cautioned that these activities require careful consideration.

**Sufficient political will.** The team members who concluded that the Indonesian government possessed sufficient political will to justify exploring future activities pointed to the BAPPENAS

diagnostic assessment as evidence of the government's interest in legal reform. These team members believed that the BAPPENAS action plan, based on the diagnostic assessment's recommendations, will provide further guidance on government priorities. They also expressed their belief that possible activities identified by the team, described below, will not be changed by the new five-year plan and the future government's composition. Finally, they noted that the forces of globalization would inevitably force the government to take action to strengthen the rule of law.

Perhaps of greatest importance, these team members believed that their task was to identify activities consistent with existing government policies and programs, furthering the mission's strategic objective of improving democracy in governance through fostering rule-based standards and behavior. The team members, who focused on identifying activities that could be completed, were willing to undertake a given activity when the government official in charge at the working level was prepared to move ahead.

**Possible activities.** The assessment team's conclusions on activities considered during the field assessment's final phase are described below. (The team members who concluded that the government possessed insufficient political will to justify going forward with a government-centered program did participate in analyzing potential opportunities. However, the analysis results did not convince them that potential opportunities met standards outlined in the scope of work and the revised work plan.) An explanation of the background and rationale of the team's conclusions appear in the body and annexes of this report.

• **Supporting further analysis of the BAPPENAS diagnostic assessment's key recommendations.** The BAPPENAS diagnostic assessment contains a number of recommendations, some of which are controversial, both within the government and among various legal sector key players. The assessment's recommendations on organizing responsibilities among various government organizations were particularly controversial. The diagnostic assessment did not thoroughly discuss how recommendations were reached; nor did it analyze their implementation feasibility. This lack of in-depth analysis could be seen as a reason to not seriously consider the recommendations.

To address this issue, the mission could provide funding to BAPPENAS or another government agency to conduct further analysis and keep the recommendations on the agenda of legal sector leaders and government policy makers. Recommendations to create a presidential-level entity to foster legal reform and reorganize responsibilities among sectoral organizations are primary actions for further analysis. Further analysis should be carried out in the near future, with the current administration's endorsement, to maximize the impact on the new administration's thinking and build on internal pressures for legal reform that arise from Indonesia's financial crisis. A possible first step is to support translation of the diagnostic assessment from English into Indonesian.

• **Strengthening the use of alternative dispute resolution techniques.** Given the court system's poor performance, there is widespread interest in Indonesia in strengthening the use of ADR techniques. To date, these techniques have been little used for several reasons, including the fear that decisions reached through them could be appealed to the courts and reopened there. Once a satisfactory arbitration law is adopted (which several interviewees expected to occur in 1998), the mission could consider providing training and other assistance to existing nongovernmental arbitration services. Such assistance might be provided through the NGO program. Assistance should be contingent on the technical and financial feasibility of the organization requesting assistance.

The mission could supplement government organizations' efforts to foster use of these techniques. For instance, if the Asia Foundation's current effort with BAPPENAS (with USAID funding) and the UNDP's work with the Supreme Court make good progress and need additional funding in future years, the mission could consider responding at that time.

• **Strengthening the quality, timeliness, availability, and use of legal information.** Obtaining reliable information on laws—such as legislative enactments, decrees, ministerial regulations, and court and executive branch decisions—is difficult in Indonesia. Official publications are limited in scope and their contents are usually months or even years behind events. Libraries are not well-stocked. As a result, the quality of legal analysis is low and the possibility of making decisions based on incorrect information is high. In reaction, organizations with the resources acquire information informally for their own use. Most persons interviewed agreed that more attention should be given to improving information availability.

Several private concerns provide legal information to the public and have plans to increase their efforts. However, they are not appropriate recipients of assistance from the mission. NGO and university-based information efforts could be assisted through the mission's NGO program. The only government program focusing on legal information is BPHN, which has been receiving assistance from the mission's ELIPS project. It has prepared CD-ROMS containing laws, regulations, and other promulgations in economic law, most notably in the area of tax and capital markets, as well as State Gazette and Ministry of Finance regulations through 1996. However, these compilations are not up-to-date, and the performance of BPHN and the Ministry of Justice raise serious questions whether BPHN's work will be adequately supported after the completion of ELIPS. The decision on continuing assistance to BPHN after ELIPS ends should be delayed until it is known who will be in charge of the effort, at both the technical and policy levels, in the administration beginning April 1998.

• **Improving legal education.** The BAPPENAS diagnostic assessment, as well as most interviewees, identified weaknesses in the preparation of lawyers as an important problem. In Indonesia, basic legal education given at the undergraduate level is pursued by many students who do not intend to become practicing lawyers in either public or private organizations. The curriculum includes little practical preparation for students who do intend to become lawyers, and important topics such as professional ethics are ignored. The standard modality of instruction is the lecture. Graduate work is academic in orientation.

ELIPS' work in economic law with the country's leading public law schools has provided a base for further reform of legal education. Furthermore, both the BAPPENAS diagnostic assessment and several leading private sector figures support the concept of strengthening legal education by creating a professionally oriented graduate curriculum for students who intend to practice law. Such a curriculum would emphasize skills such as legal reasoning, the use of legal information, drafting, and clinical training, including possible internships in law firms and NGOs to reinforce the mission's ongoing work with these groups. It would also provide a greater depth of training in professional ethics and economic law topics. As such a reform would require the approval of the minister of education, it is advisable to withhold further consideration until it can be discussed with the minister.

The impact of legal education reforms on the legal system's actual operation would not be fully felt for many years. Still, if successful in improving the quality of lawyers, such reforms could make improve the operation of the legal sector and upgrade the rule of law and the role of lawyers in Indonesia. Of course, benefits of educational reform would be minimal if not accompanied by broader efforts at legal system reform.

## **E. Reassessment**

Assessment team members who believe that sufficient political will exists within the government to justify further exploration of activities mentioned above support moving forward now. According to these team members, discussions with mid-level government officials who support proposed activities could produce concrete proposals which, if necessary, could be endorsed at the policy level by the new administration. In general they do not believe that the government must undertake additional reforms

for the activities to be carried out successfully. These team members want an actively engaged mission to support the impetus to address legal sector problems in the country.

In contrast, assessment team members concerned about the lack of political will and planning believe that, once the new administration is in place, it would be advisable for the mission to reassess the context of legal sector activities. They believe it is important to gauge the leadership's support for possible activities—especially in view of the private and bureaucratic interests that are likely to oppose reforms. The only activity for possible mission support that the assessment team identified as possibly becoming prejudiced by waiting for a reassessment is further analyses of key recommendations of the BAPPENAS diagnostic assessment. An exception could be made here.

The reassessment would have a dual purpose. First, it would determine if the legal reform environment had become more favorable and, if so, whether there were opportunities to work on significant activities with core legal sector entities, such as the court system, Ministry of Justice, and the attorney general. Second, the reassessment would determine whether relevant authorities within the new administration support the areas and activities identified for possible mission support. The reassessment should take into account: the final version of the Guidelines for State Action; any action plan produced by BAPPENAS and accepted by the appropriate authority at the presidential level; public statements made by the president on strengthening the rule of law; the reputations and views of the new legal sector authorities at the policy level; and any actions taken to improve the performance of public sector organizations in the legal sector.



## **SECTION I**

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### **BACKGROUND**

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## SECTION I BACKGROUND

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### A. Purpose and Parameters of the Assessment

#### A1. Purpose

This assessment aimed to evaluate potential opportunities for USAID/Indonesia to provide additional support to legal reform in Indonesia through partnerships with legal sector organizations. The original statement of work called for preparing one of two items: a concept paper on USAID assistance to Indonesian legal reform or a report detailing the reasons why legal reform assistance is not currently a viable option. The assessment team was asked to focus on opportunities for working with executive branch ministries, the judiciary, and public universities. However, upon approval of the revised field work plan, the mission requested that the team also consider the possibility of supporting greater cooperation between government organizations, and the NGO community in legal reform. In addition, USAID determined that a concept paper was not feasible due to insufficient time to address three key issues: Indonesia's political will to achieve legal reform, lack of an action plan to support further legal reform by judicial government organizations, and unclear lines of responsibility for legal reform under the new administration taking office April 1998.

The mission's current program of support for NGOs active in the country's legal sector and justice system will be continued in the future under Strategic Objective No. 5 (SO 5)—increased effectiveness of selected institutions which promote democracy. The assessment team was not asked to address that program or identify opportunities to modify or expand it. Similarly, the team understood that the mission's current program under Strategic Objective No. 1 (SO 1)—sustained economic growth in the transition from economic development assistance to development cooperation—would continue. The assessment team was not assigned to evaluate current or planned activities under that program. Instead, the team was given the task of assessing the possibility of supporting those activities or similar activities in other programs.

#### A2. Parameters

The mission provided the following parameters through initial discussions with the assessment team:

- The mission stated that the size of any new project would be about \$1 million per year for three to four years starting in late FY 1998. The funding would come from the budgets of SO 1 and SO 5. For that reason, the composition of any new project should address the purposes of both SOs.
- The mission also advised that the assessment team consider in its work that, should the work lead to design and implementation of a new project, the mission could provide at most only half the time of a direct hire or contractor to manage the new project. (This would be in addition to any individuals contracted for work during the design and implementation stages.)
- The mission stated that, given the modest resources available, it could not expect to “bring about sweeping and dramatic changes with its assistance.” Rather, the mission saw its assistance as a catalyst for broader reforms by the government alone or in conjunction with other donor assistance.

### **A3. Political Will**

Perhaps the most important guidance from the mission was that the team should focus on whether there was political will by the government for legal reform.

## **B. Conduct of the Assessment**

### **B1. Methodology of the Assessment**

The assessment team conducted interviews with 68 people representing a broad cross-section of those involved in or knowledgeable about the Indonesian legal system. (A list of those interviewed is found in Annex B.) Interviews in Indonesia took place between November 12 and December 17, 1997. Interviews with U.S.-based individuals were conducted by telephone. All interviews in Indonesia were conducted in person. With one or two exceptions, the interviews were attended by both the team leader and the assessment team's liaison from the mission. Many were attended by other assessment team members and interested members of the mission.

### **B2. Sequencing of the Work**

The statement of work called for three phases in carrying out the work:

- **Phase 1.** Conduct a desk review and prepare a preliminary field work plan.
- **Phase 2.** Undertake initial field work to “determine the feasibility of USAID/I assistance for legal reform in Indonesia (including the possible recommendation that USAID/I assistance at this time is not appropriate).” Present a revised field work plan that discusses how it “will further focus the assessment on specific target areas to undertake more detailed analysis of such areas.”
- **Phase 3.** Conduct further field work according to the revised work plan and report on findings and suggestions arising from the assessment.

### **B3. Composition of the Assessment Team**

The contractor's assessment team consisted of two U.S. lawyers, John Oleson and Stephen Golub, who have considerable experience in rule-of-law and administration-of-justice activities in various countries; one U.S. lawyer, Eugene Flynn, who resides in Indonesia and has 10 years of experience in-country in commercial law; and an Indonesian lawyer, Mas Achmad Santosa, who has extensive experience in private practice and has managed a variety of public interest activities. The mission's liaison with the team, Ms. Kendall, is an experienced U.S. trial lawyer assigned to the mission under a fellowship grant.<sup>1</sup>

### **B4. Implementation of the Work**

#### **B4a. Desk Review and Preliminary Field Work Plan**

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<sup>1</sup> The statement of work also called for the revised field work plan to make proposals for changes in the composition of the team “to ensure the team has the appropriate mix of technical skills for the issues/sectors which are identified for detailed analysis.” During preparation of the revised field work plan, it was decided that it was neither feasible nor necessary to make such changes.

The Indonesian legal system's dysfunctional nature presents a vast array of areas in need of reform and development to strengthen rule of law. This was confirmed during the desk review in Washington. However, to narrow the assessment's focus to a manageable scope, the assessment team and the mission met in Indonesia and decided to limit the assessment to:

- (i) topics treated in the Diagnostic Assessment of Legal Development in Indonesia (March 1997), a World Bank-funded analysis organized by BAPPENAS and conducted by Indonesian experts from the public and private sectors.
- (ii) the subject matter of the USAID-financed ELIPS project, which since 1992 had been assisting the Government of Indonesia in preparing new legislation on economic topics and helping the Consortium of Indonesian Law Schools and the law faculty of the University of Indonesia to strengthen economic law instruction.

By building on the foundation laid by these two major efforts, the team could make prudent use of available resources. The BAPPENAS diagnostic assessment was the result of more than two years of work by Indonesian professionals from all parts of the legal sector. Similarly, ELIPS design and implementation involved a sustained effort by local and foreign professionals over many years. It was decided that the assessment team could not analyze areas outside these two efforts because of time and resource limitations. Further, it was unlikely that USAID would find the necessary resources to design activities in areas not previously analyzed.

In addition, the two efforts had produced activities and recommendations to strengthen Indonesia's attractiveness to international investment and commerce. This made the efforts attractive to Indonesian policy makers and eligible for future financial support under both SO 1 and SO 5.<sup>2</sup>

The Washington desk review identified areas outside the scope of the BAPPENAS assessment and ELIPS that affected the average Indonesian's relationship to the rule of law. However, work in each area presented potentially serious political issues that seemed wise for USAID to avoid—especially as the agency's in-country presence and role in Indonesia's development would be reduced during the five-year phase-out. For instance:

- There appears to be little evidence that Indonesian policy makers are interested in systematically attacking corruption in the legal system, reforming the operation of the criminal justice system, or improving state agents' observation of human rights.
- Work on family law issues requires an understanding of Islamic legal traditions and the establishment of relationships with Islamic legal institutions, which USAID does not have and cannot easily acquire.
- Recognizing, and building on, the role of regional traditions in the operation of the rule of law can conflict with the state's policy of a single, national legal system. While the two are not incompatible, work in this area is politically and socially sensitive.

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<sup>2</sup> The BAPPENAS diagnostic assessment is a technically oriented document. It does not analyze the political, social, and cultural bases for the current state of the legal sector or how such forces influence the prospects for the introduction of reforms into the operation of that sector. Such aspects were considered by the current assessment team and will need to be further analyzed during any design work undertaken in the future.

- Work on legal principles and structures in labor, administrative, and land tenure law is probably best done in the context of a program with a sectoral emphasis rather than a purely legal focus. Such work could be carried out with groups other than government agencies. For example, a March 1997 analysis of land tenure issues in Indonesia that AGRIDEC prepared for the mission proposed a program on land tenure legal issues limited to work with NGOs.

#### **B4b. Revised Field Work Plan**

The December 2, 1997, revised field work plan and interim report provided results for the nine areas identified for further consideration in the preliminary field work plan. After reviewing the assessment team's proposal for further work, it was decided that the assessment team should concentrate on three areas: alternative dispute resolution (ADR), legal information, and legal education. There was widespread agreement that these areas needed attention. In addition, the government had tried to achieve reform in the three areas.

The mission added an additional focus on support for private and public sector cooperation in strengthening legal sector operation. Some areas identified by the preliminary field work plan as requiring further exploration did not, in fact, lead to follow-on work. These areas are discussed in Section III.

The revised field work plan also raised some assessment team members' concern that the government's commitment to legal reform was not great enough to justify a new project focusing on government activities. This concern is discussed in Section II.

#### **B4c. Impediments to Conducting the Assessment**

There were several impediments that affected the assessment's results.

**Government transition.** At the time of the assessment's field work, government policies and plans were unclear. There were several factors at work:

- Ideas for the Guidelines for State Policy—which would form the basis of the five-year plan for 1998-2003—were considered without full public debate by the People's Assembly. These guidelines were scheduled for adoption in March 1998.
- The choice for vice president was not clear, leading to considerable political concern. Reports of the president's frail health, together with the major financial crisis facing the country, contributed to these concerns.
- Cabinet posts and other key positions in the next administration would not be chosen until April 1998 at the earliest.
- Traditionally in Indonesia, government officials avoid important decisions during the People's Assembly, held every five years. This allows the new administration to make important staffing decisions without aspirants for office "rocking the boat."
- While the current five-year plan had another year to run, people's attention had begun to turn to what the new five-year plan was likely to contain.

One consequence of the above was that government officials were less willing than usual to commit themselves to a definite plan of action, making the political will of the government appear

weak. Furthermore, as no one knew with confidence who would be in charge of legal reform initiatives, it was impossible to predict whether activities in a particular organization would be supported, ignored, or opposed. This is particularly true in a society like Indonesia, where personal relations and attention are more important than policy or institutional responsibilities. Concerns on reform could continue, notwithstanding the result of the transition, and it is not clear that such concerns will be resolved.

**Lack of clarity on how the BAPPENAS diagnostic assessment would be used.** Another problem caused by the assessment's timing was that it was conducted before the government formulated and adopted an action plan based on the BAPPENAS Diagnostic Assessment of Legal Development.

The BAPPENAS diagnostic assessment, which was issued in March 1977, contained numerous recommendations for action. (A table summarizing those recommendations is provided in Annex C of this report.) A seminar was held in September 1977 to discuss the report's contents. BAPPENAS is now reviewing the report and the seminar results to prepare for the new five-year plan for 1998-2003. However—with the diagnostic assessment and its recommendations forming the universe from which the assessment team selected activities for possible USAID support—the government's lack of response to the recommendations was a major gap in the information the team needed to make wise choices. This situation made it difficult for the team to predict future government support for legal reform in general or for specific activities. For this reason, it may be advisable to reassess the situation, as suggested in Section II.<sup>3</sup>

**Content of interviews.** When the mission requested interviews with government and university officials, it did not state that the assessment team was interested in discussing specific requests for assistance. Nor did the mission ask prospective interviewees to prepare written statements. This was because the assessment was meant to clarify overall prospects for strengthening the rule of law and identify possible areas of opportunity rather than design particular activities. It also reflected the mission's wish to avoid raising premature expectations for assistance.

Possibly due to this approach, most officials were not prepared to describe specific plans and discuss ways in which USAID could assist in implementation. Interviewees discussed legal reform and development and expressed general concern over legal system weaknesses. When asked to describe the ways that USAID could be of assistance, the most often heard response was "training." In short, the ideas and concerns expressed were of a general and undeveloped nature, suggesting that little serious thought and conceptual work had been devoted to the issues of legal reform and institutional strengthening. When offered the opportunity to provide such information in a subsequent interview or in writing, interviewees did not respond—at least not within the team's specified time for completing field work.

**Limitations on the universe of interviewees.** The mission decided that the assessment team's work should be confined to Jakarta. This was because the mission believed the assessment's primary focus should be on determining the government's political will to carry out legal reform, and political decision making is highly centralized in Indonesia, with most important decisions made in Jakarta.. The decision also may have been the result of budget restrictions and the view that the assessment team's time would be better spent interviewing the wide selection of officials based in Jakarta rather than traveling to other regions.

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<sup>3</sup> BAPPENAS had planned to produce an action plan in October or November of 1997, but it was still working on a draft in December of that year and had adopted a completion target date of January 1998. BAPPENAS was unwilling to share its preliminary versions of the plan with the assessment team.

The decision to confine the team's work to Jakarta may have been correct. However, the result is that the assessment team's thinking did not take into account the conditions and views of people outside Jakarta. Given Indonesia's social and cultural diversity, political and legal leaders outside Jakarta could have a different—and valuable—perspective on the central authorities' political performance. In addition, these authorities could offer valuable perspective on the success of policies adopted in Jakarta for implementation elsewhere in the country. Such officials could also suggest activities to support legal reform that may not be apparent to officials in Jakarta. Pilot projects outside Jakarta could lead to substantial results, including successfully increasing authority delegation and decentralization.

Beyond the Asia Foundation and the World Bank in Washington, the assessment team did not interview other donors. In part this resulted from the team's difficulty in reaching the appropriate officials (one example is cooperation with the Netherlands, which is now conducted through indirect channels). Another factor was the decision to save time by relying on the mission's understanding of other donor programs and priorities. While this limitation may not have distorted the assessment team's results in a serious way, it is true that members of the donor community often have valuable insight into local conditions. The viewpoints of other donors are often different from that of U.S. government personnel and U.S. consultants and they often maintain a broad variety of local contacts.

## **SECTION II**

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### **MAJOR CONCLUSIONS AND RECOMMENDATIONS**

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## SECTION II

### MAJOR CONCLUSIONS AND RECOMMENDATIONS

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#### **A. Government Commitment to Strengthening Rule of Law and Reforming Legal Sector Operation**

Assessment team members disagreed about the degree of government commitment to strengthening the rule of law and reforming legal sector operation. The team also could not reach agreement on potential actions—whether at the sectoral level or among individual activities—that would adequately demonstrate government commitment to legal sector reform. The two lines of thinking are presented below. The first holds that the government possesses insufficient political will to justify going forward with a government-focused program. The second line of thinking is that sufficient political will does in fact exist. Because the concept of political will was critical to the assessment team's work and conclusions, Annex G elaborates on the meaning of the concept, and its impact on assessment team thinking.

##### **A1. Insufficient Political Will**

The conclusion of some team members that insufficient political will exists to justify going forward with a government-focused program at this time was based on the following:

- People interviewed outside the government expressed strong skepticism that the government at the political level was interested in dealing with core issues facing Indonesian legal system reform.<sup>1</sup>
- Government officials expressed similar skepticism or indicated that systematic reform depended on decisions they could not predict.
- Current Guidelines for State Policy and five-year plan for government action place stressed improvements in legal sector performance and the president made a statement in 1994 to support legal reform efforts. However, implementation has been modest, as the government places little emphasis on legal reform.
- While the Guidelines for State Policy and the five-year plan for 1998-2003 are still being developed, most people appear to believe that changes will not be significant and will not lead to increased support for legal reform.
- There is no evidence of a strategy at either technical or political levels of the government to reform the legal system. The SEKNEG official responsible for legal matters was not able to describe a legal reform strategy beyond stating that efforts to improve legal and justice sector operation should not focus on government activities, because such emphasis implied reliance on the state budget. Nor was the official in favor of reorganizing government justice sector entities' relationships or further presidential endorsements of reform efforts. The official did express approval of certain reform activities and describes his personal involvement in reform activities outside the government, voicing his preference of keeping legal reform away from the political level of the government. These views conflict with the BAPPENAS diagnostic

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<sup>1</sup> Political level refers to the Office of the President and civilian and military officials with access to and influence on that office.

assessment's main recommendations on the government's work in the legal sector. This may be the result of the fact that recommended changes would tend to diminish the official's authority.

- The operational budget of the government's legal sector is a small fraction of the government's overall budget—the minister of justice estimated that it is no more than 1 percent. Given the country's current financial problems, it is unlikely to increase.
- At the working level, the government is not moving ahead with reform activities or developing concrete proposals for reform.
- The eventual political impact of pressures arising from the country's current financial crisis is unclear. Likewise it is difficult to predict the government's reaction to external demands for a better legal system. Some observers believe that key government economists and military leaders are not convinced that legal system reform is particularly important; these leaders may view legal reform as distracting the country from more important issues or even as potentially destabilizing. (The assessment team did not benefit from the views of the U.S. Embassy's Political and Economic Sections on these questions.) According to this perspective, there is no reason to move forward before there is clear evidence that pressures have changed the thinking of the government's political level.
- The consensus is that Indonesia's state legal apparatus controlled by bureaucratic, political, and private interests that sacrifice public good for the gain of a few. There are exceptions to this in both government and the private sector, but the bottom line is that strict observance of the rule of law does not benefit many influential forces within and outside the government.

According to the above line of thinking, it is not the time to pursue a government-focused program. To do so—without an adequate explanation—could leave the impression that the U.S. government is satisfied with the Indonesian government's legal reform efforts. Furthermore, such activities are unlikely to serve as catalysts for wider reform, given the context. The funding could have a far greater development impact spent differently.

At the least, the situation calls for extra caution in undertaking activities with government entities to ensure that support for activities is strong and reliable and the effort is sustainable. This line of thinking holds that the assessment team was unable to identify appropriate activities. Some activities that were identified would be supported through the mission's ongoing NGO program. In other cases, their development and implementation under a new project would require attention.

Proponent of this line of thinking did believe that, in some cases, efforts were justified to encourage the political level of the government to support meaningful reform or support activities with public universities. These possibilities are discussed below.

## A2. Sufficient Political Will for Supporting Individual Activities

Some team members concluded that sufficient government support for certain activities exists to justify USAID support. These team members based their views on five considerations:

- For the first time, the 1993 five-year plan emphasized Indonesia's need for legal reform and development by treating the subject in a separate chapter. The upcoming five-year plan is expected to emphasize legal reform at least as much as the 1993 plan. This is bolstered by referring to the country's need to develop a "legal culture" among all segments of society.
- Diagnostic assessment preparation under BAPPENAS supervision is also an expression of the government's recognition of the need for legal reform. Given that the diagnostic assessment was only made available to the public in September 1997 and in English, the response has been reasonably encouraging. The assessment team learned that a technical team in BAPPENAS is preparing an action plan, which will be released soon.
- Bureaucrats' lack of independent ideas for legal system reform should not be confused with a complete lack of political will. In Indonesia, extreme deference is paid to the executive branch and to the chief executive in particular. In this context, it is not surprising that initiatives are in short supply within the government.
- While it is too soon to predict the impact the current economic crisis on Indonesia, the International Monetary Fund may well decide to condition aid on stricter compliance with banking laws and greater transparency in financial transactions. Some people interviewed expressed the belief that the government will come to recognize that rule-based systems are essential to Indonesia's successful integration in a global system. The government will then take appropriate action.
- With the exception of work on ADR mechanisms requiring passage of a new arbitration law, the activities under consideration do not require further government demonstration of willingness and support.

According to this line of thinking, attention should not be focused on the existence of a broad legal reform strategy or program within the government. Instead of political will should be measured by concrete support for particular activities by those responsible for conducting them.

## B. Areas Not Suitable for Further Exploration

As indicated in Section I, the assessment team concluded that several areas originally seen as potential candidates for a government-focused program were not worth further exploration. These areas are described below. A fuller discussion is provided in the assessment team's revised field work plan and December 2, 1997 interim report.

**Law development.** There is universal agreement that Indonesia needs to reform the statutory basis of its legal system to respond to modern conditions. However, current work in this area is not progressing well. ELIPS has assisted this effort since 1992 by providing external input to the process. After completion of ELIPS in September 1998, additional input could be provided through IQCs. A new government-focused project is not needed in this area.

**Strengthening the judiciary.** All Indonesian interviewees listed are working to improve the judiciary's performance, a priority of the legal reform movement. The BAPPENAS diagnostic

assessment states that improving the judiciary must be the “core” of any legal reform program for Indonesia and proposes a broad-based attack on the problem with monitoring of progress of BAPPENAS. There appears to be support both within the judiciary and elsewhere for encouraging more specialization of judges in commercial law. This might provide an entry channel for a broader reform program. However, the mission decided that the judiciary’s overall problems were too great to offer hope of any progress and that the assessment team’s attention should be placed elsewhere.

**Organization and supervision of the legal profession.** Bar associations in Indonesia are weak, disorganized institutions. They do not perform the functions of bar associations in other countries. Neither they nor the Ministry of Justice, which licenses lawyers, exert real supervision over the performance of lawyers. Codes of ethics for lawyers are not generally accepted. The assessment team could find no practical way to address the problem and concluded that the area was not a promising one for the mission’s attention.

**Provision of legal services.** The government’s provision of legal services for persons who can not afford their own lawyer is very weak. The assessment team could find no evidence of a commitment by the government to improve the situation and concluded that the area was not a promising one for the mission’s attention.

**Support of private and public sector cooperation in strengthening the rule of law.** After reviewing the proposed revised field work plan and interim report, the mission requested the assessment team to broaden the scope of work to include consideration of supporting private and public sector cooperation in addressing legal reform and development. The assessment team did not find any ongoing effort or organization that could easily be a vehicle for such support. However, limited efforts are underway. For example, the Steering Committee in support of ADR (mentioned in Section III), a foundation, addresses questions of interest to corporations; and a group of reform-minded lawyers discussing creation of a new private organization of political and social groups aimed to objectively analyze legal sector problems. However, the time may not yet be ripe for the mission’s involvement in the topic except, perhaps, through the ongoing NGO program, which might request proposals from potential organizations to address the topic.

## C. Suggested Next Steps

As would be expected, suggestions for next steps vary among team members depending on their line of thinking. Alternative suggestions are below.

### C1. The Contextual Approach <sup>2</sup>

The line of thinking which concludes that there is not sufficient government support for legal reform recommends that, except for consideration of key recommendations of the BAPPENAS diagnostic assessment, no further steps should be taken to explore a possible new project focused on activities with the government. Explorations of possible activities with public sector should be limited to those with universities and be considered with caution.

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<sup>2</sup> In addition, there is the possibility that steps in support of legal reform could be included in programs whose focus is broader—such as a reform of the banking system or of the system of accountability of public and private enterprises. The political will for, and probable impact of, the legal reform would then be greatly reinforced. Such reforms would deserve support but not as a separate project focused exclusively on the formal legal sector.

This approach could be reconsidered after the next government is installed in 1998 and if there is some indication that the new government is more committed to significant legal reform. Indicators of commitment might be:

- Appointment of strong, reform-minded persons to key positions such as Minister of Justice, Attorney General, and SEKNEG's legal division, and their appointing similar persons to key to areas of probable USAID focus, such as the BPHN.
- Adoption of an action plan for carrying out a reasonable number of the recommendations in the BAPPENAS diagnostic assessment—in particular, for better coordination among the government entities in the legal sector and to assure implementation of the plan now under preparation.
- Political level of the government has made clear that a program of legal development and reform is to be pursued.
- Budget provided to legal sector organizations is adequate to accomplish the adopted action plan.

Of course, any particular activity which might be considered should have clear support from the political and technical levels of government.

The reassessment could be conducted by USAID personnel (stationed in Indonesia and elsewhere). It would be advisable to include a staff member, or outside consultant, with considerable experience in development programs in the justice sector. Given the sensitive nature of the conclusions, it would be preferable for that person not to reside in Indonesia.

## **C2. The Pockets-of-Opportunity Approach**

The alternative line of thinking concludes there is sufficient support from within the government to support the activities identified in this report, particularly in the areas of legal information and legal education. Efforts in the field of ADR should await passage of the arbitration law. Otherwise, no further action by the government will be necessary to carry out the activities. Except for BPHN, which might be considered a candidate for at least one of the activities the area of legal information, none of the activities identify an Indonesian government entity as the most appropriate overall counterpart. The possible activities and their justification are discussed in Section III.



### **SECTION III**

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#### **AREAS SELECTED FOR POSSIBLE FURTHER EXPLORATION**

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### SECTION III

#### AREAS SELECTED FOR POSSIBLE FURTHER EXPLORATION

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##### **A. Support for Further Analysis of Recommendations of the BAPPENAS Diagnostic Assessment**

The BAPPENAS diagnostic assessment was issued in March 1997. It has not received the attention for which its sponsors and authors had hoped. BAPPENAS held a seminar in September 1997 to discuss its recommendations. Apart from the invitees to that seminar, copies of the diagnostic assessment have not been widely distributed. The key summary volume is in English only. Many persons interviewed by the assessment team either did not know of the BAPPENAS diagnostic assessment or were aware of its contents in only a general way and second-hand.

BAPPENAS is taking the recommendations into account regarding the new five-year plan. However, the report is not being used for any other purposes and seems to have lost the attention at the government's political level. This problem is partly due to the departure from BAPPENAS of the Assistant Minister who was the leading sponsor of the diagnostic assessment, and the fact that his successor has not yet assumed full duties or indicated whether or not he will actively support the recommendations of the diagnostic assessment.

Neither the report nor the government's reaction to it evidences any sense of urgency in implementing the various recommendations of the report. Perhaps the most controversial, but potentially the most important, recommendations of the report are that a new agency at the presidential level should be created to see that a program of legal reform is pursued, and that the work of the various government organizations in the legal sector are better coordinated or actually merged. Those recommendations do not appear to have significant support among the members of the current government. Indeed, they appear to have generated active opposition from key persons at the political level. There is a danger that the recommendations will simply fade into the background.

In reaction to this situation, several persons have suggested to the assessment team that USAID might support efforts to attract the attention of the government's political level that has focused on the recommendations of the BAPPENAS diagnostic assessment, especially those concerning structural changes in the government sector. Clearly, any such effort would be potentially sensitive for both the Indonesian and U.S. governments. Its success is very problematic. Still, the impact of a success would be of great consequence.

The team's suggestion is that the mission fund—either alone or in conjunction with other donors—further study of the key recommendations of the BAPPENAS diagnostic assessment and of how they might be implemented. (A first step could be supporting the translation of the diagnostic assessment into Indonesian.) This would be useful because the BAPPENAS report does not provide much analysis of the pros and cons of its recommendations or much discussion of how they might be implemented. In addition, the process would provide a convenient way of further “lobbying” the political level of the government in favor of the recommendations.

Ideally, any such effort would be undertaken soon so that it could influence the thinking of the new administration early in its existence and take advantage of the increasing interest in legal reform which may arise from the current financial crisis in Indonesia. However, that may be unrealistic and, in any event, without having the prior understanding and endorsement of the key members of the new government to the effort, there would be a danger of its results being met with resistance. A discussion of this dilemma would be necessary with the political level of the current government.

## **B. Strengthening the Use of Alternative Dispute Resolution Techniques**

Strengthening use of alternative dispute resolution techniques was identified as one of three main areas for the third phase of the assessment team's work. The result of that further analysis is provided in Annex D.

The basic conclusion of the analysis is that, if and when the executive branch sends an acceptable arbitration law to the Parliament and it is passed by that body (an event which some interviewees predicted will occur during the course of 1998), USAID could explore the possibility of supporting an effort to improve the operation of mediation and arbitration organizations functioning in the private sector. The most likely candidate for support would be BANI. The NGO program might well be used for this purpose.

The analysis recognizes that work on the topic of ADR has been undertaken by the Asia Foundation (with USAID funding) working with BAPPENAS and the UNDP working with the Supreme Court. Both activities appear to have sufficient funding for the next two years at least. Should the activities prove useful and there be a need for supplementary funding in future years, the mission then could consider participating in the activities.

## **C. Strengthening the Quality, Timeliness, Availability, and Use of Legal Information**

Strengthening the quality, timeliness, availability, and use of legal information was identified as one of the areas meriting further analysis. Obtaining reliable information concerning the law (i.e., legislative enactments, decrees, ministerial regulations, and court and executive branch decisions) is difficult in Indonesia. Official publications are limited in scope and their contents are usually months or even years behind events. Libraries are not well stocked. As a result, the quality of legal analysis is quite deficient and the possibility of incorrectly based decisions is higher. In reaction, organizations with sufficient resources acquire the information informally for their own use. Most persons interviewed agreed that more attention should be given to improving the availability of the information.

The analysis, which is more fully described in Annex E, notes that several private sector organizations are either active or preparing to be active in supplying legal information to the public, lawyers, and other interested professional and business organizations. While their coverage and quality could be improved, it does not seem that the mission could be useful in that effort without becoming involved in subsidizing commercial operations.

The analysis concludes that there are three potential opportunities which might be appropriate for mission assistance. The first is a program to translate English language legal texts and other materials into the Indonesian language, and similarly to translate Indonesian legal materials into English. The aim of such a project would be to allow a greater number of law faculty, students, and practitioners practical access to the legal materials in more developed countries. As it stands, access to such materials is difficult because they are expensive to import and the level of English needed to comprehend these texts is far beyond that of most Indonesian professionals. It is thought that law students could do the bulk of the initial rough translations, thereby improving their substantive knowledge as well as their language skills. After an initial support period the program might be self-funding based on revenues earned from the translations.

Another possible program would be to systematize the body of case law already published by the Supreme Court and the Department of Justice. This program would create a system of indexing, head-noting, and/or cross-referencing the reports of cases. Doing so would allow scholars and practitioners alike a method to research how various legal topics have been handled by the courts in the past. Again,

it is anticipated that law students could be employed to do the bulk of the work. Such a program, however, should only be considered after more information regarding the Dutch program, which the team was told is currently underway, is obtained and considered.

The mission also could re-examine the possibility of working with BPHN. One approach that may be worth exploring is the possibility of BPHN working together with a nonprofit foundation or cooperative in the publication of legal materials to permit BPHN to find sources of funding other than its own budget and the contribution of donors. It is recognized, however, that this idea raises financial, administrative, legal, and political issues that have not been fully considered.

For the contextual line of thinking, further exploration of these activities should await the existence of a clearer commitment of the government to a program of legal reform including a policy of actively promoting the provision of legal information to the public. The suggested activities may likely need to receive budgetary support to be sustainable. For the effort with BPHN to be successful, that organization's position in the government structure and its own overall performance will have to be strengthened. Even if successful, none of the activities will produce significant changes in the operation of the legal system unless other steps are also being carried forward—such as training in the use of legal information and the publication and cultivation of professional critiques of decisions by the judicial and the executive branches.

There is no need to make an early decision on whether to go forward with any of these activities. ELIPS will be working with BPHN until September of next year, and any further external technical assistance which may be necessary could be provided through IQC mechanisms. There is time to see who will be the future authorities in charge of the BPHN's work and of what role that entity may have in reorganizing the responsibilities of the government's legal sector.

## **D. Improving Legal Education**

Improving legal education and training was the third major area in the assessment team's third phase of the work.

### **D1. Law School Education**

The deficiencies of law school education in Indonesia are set forth in the BAPPENAS diagnostic assessment and in Annex F to this report, which also contains two suggestions for possible activities for USAID to support. Both suggestions involve support for the expansion of the use of clinical experiences for law students and the incorporation of those experiences into the regular curriculum of the law schools. One suggestion involves use of NGOs as sites for the clinical experience, and the other the use of law firms as sites for the clinical experience. Each involves its own potential difficulties and advantages. For instance, the first approach might also serve as a way of strengthening the public interest law movement. It also might be implemented through the mission's ongoing NGO program if a separate, new project activity in legal education were not feasible. While both require a significant amount of faculty time for oversight (and thus may give rise to resistance to their introduction) and are costly to run, experience in other countries such as Bangladesh, Nepal, the Philippines, and India suggest that these problems can be overcome.

While the introduction of clinical experience into the law school education in itself would be a major accomplishment, there are other possible activities which also could make a significant improvement in the quality of that education. They would build on the work undertaken through ELIPS to prepare law school faculty to teach economic law subjects including such topics as ADR and the use

of legal information, and to assist in the creation of teaching materials needed in such courses. Much work remains to be done—especially in law schools outside Jakarta.

A more radical suggestion, made to the assessment team and included in the BAPPENAS diagnostic assessment, is to support the creation of a post-graduate program aimed at those students who intend to be lawyers (in private practice or government legal bureaus, in the judiciary and in the Office of the Attorney General). They would be a small minority of the students currently taking law as a basic university course of study. The course of study would be new and thus, perhaps, not subject to all the objections to change which have been raised in the past to attempts to “professionalize” the basic law degree. Starting afresh might permit more effective attention to teaching the skills of legal reasoning, the use of legal information, and the writing of opinions and drafting of contracts. The use of interactive teaching techniques and of clinical experience could be given greater attention, and specialized experiences could be provided to students depending on the type of practice that interests them. To permit specialization and support cost-effectiveness, the graduate course could be given at only selected law schools.

While activities with the law schools do not raise the same concerns for the contextual line of thinking as do educational activities with the judiciary or with the executive branch’s legal organizations as mentioned below, it must be recognized that any such undertakings present their own complications. Except, perhaps, for a straight line continuation of the activities being supported by ELIPS with the University of Indonesia and the Consortium of Law Schools, the activities would require extensive preparatory analysis, design work, and implementation by experienced educators. The results will be achieved only over the very long term, with little likelihood of their achieving noticeable impact on the quality and performance of law graduates during the life of the mission’s current results framework. In any event, the activities should be undertaken only if there is clear support for them by the necessary authorities—the appropriate Deans and the Ministry of Education—and if those authorities take the initiative in preparing proposals for action.

## **D2. Continuing Legal Education and In-Service Training**

The BAPPENAS diagnostic assessment recommends that more attention be paid to the in-service training provided to lawyers working in the judiciary and in the executive branch and to the continuing legal education of lawyers in private practice. Concerning the latter, it recommends that a Law Practice Institute be created and subsidized for five years to serve as a model for the many ad hoc commercial continuing legal education entities which come and go. The law faculty of the University of Indonesia has an on-going program of continuing legal education that is nearly self-sustaining. Faculty members trained under ELIPS are involved. Some lawyers from government, as well as those in private practice, have attended.

The assessment team did not find these activities to be attractive for assistance by the mission. The in-service training programs of the various ministries, the attorney general, and the judiciary do not have good reputations. The students are not motivated. Working with these programs would have the problems associated with direct activities with the government and, in any event, the mission’s guidance was that it did not think that a program with the judiciary would be manageable or fruitful given the difficult conditions facing such an undertaking.

Working on continuing legal education is less attractive than working with law students since the greater need is to train lawyers in the basic skills of “lawyering” and to provide instruction in the basic principles of the new subjects comprising the economic law curriculum. Specialized aspects of such subjects can be taught to practitioners on a commercial basis which would not need the mission’s

support. There does not seem to be any particular advantage to encouraging NGOs to become active in such training efforts unless it is in their particular areas of focus thereby justifying support.



**ANNEX A**

**GLOSSARY**

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**ANNEX A**  
**GLOSSARY**

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AAI	Indonesian Bar Association
ADR	Alternative Dispute Resolution
AKHI	Indonesian Legal Consultants Association
BANI	Indonesian Arbitration Agency
BAMUI	Muamalat Arbitration Body of Indonesia
BAPPENAS	Agency for National Planning and Development
BAPPH	Legal Professional Education Accreditation Board
BKPM	Coordination Agency for Capital Investment
BPHN	National Law Development Agency
BPPH	Legal Profession Supervisory Board
BPPHN	Law Reform Agency
CDR	Court Dispute Resolution
DPR	Parliament/House of People's Representatives
ELIPS	Economics Law and Improved Procurement Systems Project
GATS	General Agreement on Trade in Services
GATT	General Agreement on Trade and Tariffs
GBHN	Guidelines of State Policies
HIR	Civil Procedural Law
IPHI/HPHI	Association of Indonesian Lawyers and Paralegals
IKADIN	Indonesian Bar Association
IKAHI	Association of Indonesian Judges
KEPPRES	Presidential Decree
KUMDANG	Directorate General for Law and Legislation, Dept. of Justice
LBH	Legal Aid Center
PERADIN	Indonesian Bar Association
PP	Government regulation
PROLEGNAS	National Legislation Program
REPELITA	Indonesia's Five Year Development Plan
RPP	Draft of Government Regulations
RUU	Draft of Statutes
YLBHI	Indonesian Legal Aid Foundation



## **ANNEX B**

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### **PERSONS INTERVIEWED**

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**ANNEX B**  
**PERSONS INTERVIEWED**

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The following persons have been interviewed either in person or by telephone by members of the team or have submitted views in writing to the team.

**I. U.S.-Based**

Dan Getz  
Program Officer  
The United States Indonesia Society

Dr. Leon E. Irish  
President, International Center for Not-for-Profit Law

Patrick Meagher  
Associate Director, Center on Institutional Reform and the Informal Sector (IRIS)

Teresa Genta-Fons  
Senior Counsel, Legal Department of the World Bank

Professor Ted Parnall  
University of New Mexico Law School  
(former Chief of Party and Law Development Advisor of ELIPS)

Professor Cliff Thompson  
University of Wisconsin Law School  
(former Legal Education Advisor of ELIPS)

Michael Miklaucic  
Democracy Center of AID/W

John Brandon  
The Asia Foundation, Washington

William Cole  
The Asia Foundation, San Francisco

Virginia Murray  
Department of State

Professor William Liddle  
Ohio State University

Professor John Bresnan  
Columbia University School of International and Public Affairs

Professor Daniel Lev  
University of Washington

Professor Richard Buxbaum  
Boalt Hall School of Law, University of California at Berkeley

Sydney Jones  
Asia Watch

## **II. Indonesia-Based**

### **A. USAID/Indonesia Mission Personnel**

Vivikka Molldrem, Mission Director  
Karen Turner, Deputy Mission Director  
Mark Johnson, SO-5 Chief  
Maria Rendon, SO-5  
Patricia Kendall, SO-5  
Barry MacDonald, SO-1 Chief  
Tamara Fillinger, RLA

### **B. Sekneg**

Bambang Kesowo  
Legal Affairs Advisor

### **C. Ministry of Justice**

Oetojo Oesman  
Minister of Justice

Bagir Manan  
Director General of Law and Legislation

H.A.S. Natabaya  
Director of BPHN

Kuswantyo Tami Haryono  
Head of Legal Documentation Center of BPHN

Ninik Hariwanti  
Member of Legal Documentation Center of BPHN

Adi Sujatno  
Director of MOJ Center of Education and Training

#### **D. Office of the Attorney General**

Atti Singgih  
Attorney General

Suhadibroto  
retired Deputy Attorney General  
(submitted paper with views)

#### **E. Related to BAPPENAS**

Sutadi Djajakusuma  
Member of Parliament  
(former Assistant to the Minister for Law Development, Social and Inter-Institutional Relations)

Pratiwijarti Suhardjo  
Assistant to the Assistant to the Minister for Law Development, Social and Inter-Institutional Relations

#### **F. Related to the Judiciary**

Marianna Sutadi  
Justice of the Supreme Court

J. Djohansjah  
Justice of the Supreme Court

Paulus E. Lotulung  
Head of Research and Development Division of Supreme Court

Din Muhammad  
Head of Training, Research and Development for the Supreme Court

Yahya Harahap  
Deputy Chief Justice for Criminal Law Affairs of the Supreme Court

Purwoto S. Gandasubrata  
former Chief Justice of the Supreme Court

#### **G. Related to Universities and Academic Institutes**

Andi Andoyo Soetjipto  
Dean, Faculty of Law, University of Trisakti  
(Former Justice of the Supreme Court)

Prof. Dr. Sunaryati Hartono  
Currently associated with University Padjadjaran and Executive Director of Yayasan Winaya Dharma, a private educational foundation  
(Retired Director of BPHN)

## **Members of University of Indonesia Faculty of Law**

Sri Suwardi, Dean  
Sri Mamudji, Deputy Dean for Utilization of Information System  
Harkristuti Harkrisnowo, Lecturer  
Hikmahanto Juwana, Lecturer  
Satya Rinanto, Secretary, Department of Constitutional Law  
Erman Rajagukguk, Professor

## **H. Related to ELIPS**

Normin Pakpahan  
Assistant Minister, Human Resources Development, Science and Technology of the  
Coordinating Ministry for Economy, Finance and Development Supervision

Gary Goodpastor  
Law Development Advisor and Chief of Party

James Agee  
Project Administrator and Legal Information Advisor

## **I. Practicing Lawyers**

Darrell Johnson  
Soewito, Suhardiman, Eddymurthy & Kadono

Mardjono Reksodiputro  
Executive Secretary of the Konsorsium of Law Schools and professor of law and former Dean at  
University of Indonesia  
Ali Budiardjo, Nugroho, Reksodiputro

Frans Winarta  
Frans Winarta & Partners

Adnan Buyung Nasution  
Nasution, Soedibjo, Maqdir & Partners  
(also founder of YLBHI, see J below)

Gregory Churchill  
Ali Budiardjo, Nugroho, Reksodiputro

Mulya Lubis  
Lubis, Santosa & Maulana

Kartini Mulyadi  
Kartini Mulyadi & Rekan

## **J. NGOs and other Organizations**

Prof. Dr. Charles Himawan  
Chairperson for Subcommission for Education and Public Awareness of Human Rights,  
Komnasham (National Commission for Human Rights) also professor of law and former Dean at  
University of Indonesia

Bambang Widjajanto  
President of Board of Directors of the Indonesian Legal Aid Foundation (YLBHI)

Nursyahbani Katjasungkana  
Director of the Indonesian Women's Association for Justice (APIK)

### AKATIGA

Issono Sadoko, Director  
Hetifah Sjaifudian, Public Policy Analyst  
Juri Thamrin, Researcher  
Nurina Widagdo, Researcher

Priyatna Abdurrasyid  
Chairman of Board of Directors of BANI

Mas Achmad Santosa  
Executive Director of the Indonesian Center for Environmental Law

### **K. Other Donors**

Doug Ramage  
Representative, Asia Foundation

Suhaesih Basari and Tessa Piper  
Program Officers, Asia Foundation

Jill Tucker  
Human Rights Manager of Reebok Worldwide Trading Co.  
(former assistant representative of Asia Foundation)

### **L. Commercial Firms**

Sintha Ratnawati  
Manager of KOMPAS' Information Center

### **M. Parliament**

Commission One  
Aisyah Aminy, Chairperson  
Aminullah Ibrahim, member



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**ANNEX C**  
**TABLE OF POLICY AND TECHNICAL RECOMMENDATIONS OF THE BAPPENAS**  
**DIAGNOSTIC ASSESSMENT OF LEGAL DEVELOPMENT IN INDONESIA**

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## **ANNEX D**

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### **ALTERNATIVE DISPUTE RESOLUTION**

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## ANNEX D

### ALTERNATIVE DISPUTE RESOLUTION

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#### I. Introduction

The team found widespread support for instituting ADR mechanisms (including arbitration, mediation, and conciliation) to resolve legal disputes. That support, among other things, is reflected in the interest generated by the “new” draft arbitration law (initially prepared under the ELIPS Project) currently under review with the State Secretariat (SekNeg). Interestingly, the new Manpower Law (Law No. 25 of 1997) contains some specific provisions regarding arbitration and mediation as methods to resolve industrial relations conflicts (Arts. 59 through 70).

The future of ADR in Indonesia, however, is contingent upon creating a solid legal basis (most likely in the form of a new arbitration law) and introduction of technical and procedural improvements in Indonesia’s ADR process.

#### II. Historical Background

An accurate description of the current legal basis for arbitration in Indonesia would require a review of the country’s pluralistic legal history under Dutch rule and a synopsis of the way in which laws and regulations from the colonial era have been treated, both formally and in practice, since independence. Suffice it to say that the existing law on arbitration in Indonesia is found in the 1847 Regulations on Civil Procedure (the so-called R.V.). Due to reasons arising out of the pluralistic nature of the colonial legal system (i.e., different sets of rules applied to the various population groups), the R.V. is generally regarded to be in the nature of guidelines rather than law. This antiquated and somewhat infirm basis has been a contributing factor to unsuccessful arbitration in Indonesia.

Over the last 20 years, however, there have been a number of significant developments in Indonesia with respect to dispute settlement through arbitration. In 1977, the *Badan Arbitrase Nasional Indonesia* (BANI), i.e., the National Arbitration Board of Indonesia, was established under the auspices of the Indonesian Chamber of Commerce (KADIN). In 1981, Indonesia ratified the New York Convention of the Recognition and Enforcement of Foreign Arbitral Awards (1958), and in 1990, the Supreme Court of Indonesia issued regulations regarding the Enforcement of Foreign Arbitral Awards.

Despite these developments, arbitration has generally been ineffective to date in Indonesia. In his report on *Accomplishments, Plans and Objectives of the Law Development Component of the ELIPS Project* (October 1996), Normin Pakpahan summarizes various reasons why arbitration has not been more successful in Indonesia:

First, there has been a general lack of knowledge, information, and awareness about the concept and potential advantages of arbitration.... Second, there is a fear in Indonesia that arbitration awards will not be enforced by courts.... Third, existing legal provisions on arbitration...do not sufficiently guarantee the enforcement of arbitration agreements and any resulting arbitration award. Finally, ... BANI’s arbitration panels are comprised only of Indonesian nationals ... [who] may accordingly be subject to political or economic pressure.

#### III. Encouraging Recent Developments

Despite these impediments, however, there are indications that arbitration, and perhaps other forms of ADR, may finally begin to take root in Indonesia. Several initiatives are underway that lend credence to this view. Perhaps most important, the draft arbitration law currently with SekNeg is widely anticipated to be passed into law in 1998. The team has heard from informed sources that the passage of that law, probably revised to include other forms of ADR, will be a priority of the new cabinet. The team has also received unconfirmed reports that passage of a modern law on arbitration was one of the conditions set by both the ADB and the IMF as part of their economic assistance programs to the Republic of Indonesia.

Another important initiative already underway is the establishment of the Steering Committee for the Institutionalization of ADR in Indonesia. Bambang Kesowo of SekNeg chairs the Steering Committee whose mission is to lay the groundwork for the formation of a Professional ADR Association. The Steering Committee is currently funded by the Asia Foundation (using funds provided by the mission), and it is our understanding that no additional funding will be required for the next 18 to 24 months.

Another notable development is inclusion of ADR as a clinical program of the new curriculum for the law faculties of the “Consortium of Law Schools” comprising the University of Indonesia and the 25 other public law faculties throughout Indonesia. Although hampered by the lack of educational materials in the Indonesian language, the national law faculties are for the first time offering students exposure to various ADR techniques and practices. It is inevitable that such instruction will lead to a greater knowledge and understanding of ADR among the next wave of lawyers in Indonesia.

It should be mentioned that UNDP is funding what we understand to be a program of “Court-Assisted Dispute Resolution” (or “CDR”) in which judges at the District Court level act as mediators and/or conciliators between the parties in an attempt to avoid the investment of time, effort, and money associated with a formal trial on the merits. We have not spoken directly with representatives of UNDP regarding this program, therefore our information is limited.

#### **IV. Necessity of New Arbitration Law**

At present, the legal basis of arbitration in Indonesia is old and frail. The procedures laid out in the R.V. are 150 years old and are not suitable for modern needs. Moreover, the very legitimacy of the R.V. as a legal basis for arbitration is open to question. To raise the stature of arbitration as a legally-recognized method of dispute resolution, to eliminate the fear of judicial reexamination of arbitral awards, and to serve as the catalyst for the establishment of one or more effective arbitral bodies in Indonesia, a new arbitration law is needed. If a suitable draft is reported out of SekNeg, passed by the DPR and signed into law by the President, such action would represent a strong expression of political will that Indonesia is determined to make further progress in developing a rule-based system of conflict resolution. On the other hand, if such a new law is not promulgated within calendar year 1998, inaction would send an equally strong signal that improvement in the area of ADR is not on the Government’s agenda at this time.

#### **V. ADR Development Program**

If a new arbitration law were promulgated in the near future, specific benefits could be derived from the programs designed to provide technical assistance and support to existing providers of ADR services.

The team is aware of several arbitral boards already in existence, but had an opportunity to meet only with a representative of BANI, the oldest and most prominent of the arbitral boards in Indonesia. For all its failings (at least some of which were for reasons beyond the control of BANI), BANI has been in existence for 20 years and is recognized by the government as a legitimate body dispensing arbitral services. While BANI has not been especially effective to date for reasons summarized in Section II above, the team believes that BANI is the logical starting place for upgrading ADR in Indonesia.

Two main areas of improvement of BANI should be given consideration: first a technical review of BANI's arbitration rules; and second, restructuring BANI to create a self-sufficient arbitration board. Both activities could be undertaken as a single project.

### **A. Technical Revisions to Rules**

In light of the advancement of ADR techniques and practices over the last 20 years, BANI's Rules of Procedure should be reexamined to determine what if any changes should be made. Specific concerns have been expressed about the limited selection of arbitrators approved by BANI and the cost structure of conducting an arbitration. Moreover, explicit procedures relating to conciliation and mediation services should be addressed.

### **B. Restructuring of BANI**

BANI was formed at the initiative of KADIN and continues to rely on that organization for financial and in-kind support, including the office space occupied by BANI. KADIN also appoints the officers of the Board for terms of five years. Accordingly, while BANI's Charter indicates that it is to be an independent and autonomous entity, the fact is that it continues to remain dependent on KADIN for its existence. This may lead to a perception of lack of neutrality on the part of BANI. The present Chairman of BANI supports the view that BANI should move out from under the auspices of KADIN.

To do so, however, would require creating a financially viable scheme to allow BANI to become self-sustaining. In this area, a USAID-funded project could provide some additional impetus to ADR development in Indonesia. Essentially, an independent contractor could be charged with the assignment of creating one or more models that would allow BANI to become a self-supporting arbitral services provider. Obviously, the experiences of other service providers would provide a starting point, including, for example, the American Arbitration Association and the Singapore International Arbitration Centre.

### **C. Impacts**

- Establishment of an effective arbitration system in Indonesia would create a highly visible model of rule-based conflict resolution.

### **D. Time Frame**

- No action would be recommended prior to the promulgation of a new arbitration law with appropriate substantive provisions.

- A program to assist in the technical revision of arbitration rules and creation of structural models for BANI to become self-sustaining would require a one to two year commitment.



## **ANNEX E**

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### **LEGAL INFORMATION**

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## ANNEX E

### LEGAL INFORMATION

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#### I. Introduction

There was nearly unanimous agreement among those interviewed by the team that the state of legal information systems in Indonesia is abysmal.

As stated in the BAPPENAS diagnostic assessment, Indonesia does not have an information system that allows quick and accurate retrieval of legal information. Laws, regulations, ministerial decrees, judicial decisions and virtually all other types of legal promulgations of the government suffer from the common problems of too few copies distributed too slowly to too few people. The official publications of the government are limited and, in some instances, years behind date. And as one descends the hierarchy of governmental promulgations, the difficulty in obtaining them increases. For instance, Cabinet Ministers as well as their subordinates within the various government departments regularly issue decrees, decisions, circular letters and the like, but there is no official publication of these materials. Similarly, only selected judicial decisions are published and even judges find it difficult to get copies of the decisions of their fellow jurists.

#### II. Interviews

As part of its assessment efforts, the team has had the opportunity to meet with representatives of the (a) Legal Information Component of the ELIPS Project, (b) *Penelitian Hukum Indonesia* (PHI) (a private legal information publisher), (c) the Legal Documentation Center of the University of Indonesia (PDH-UI), (d) the National Law Development Agency (BPHN), (e) the Information Centre of *Kompas*, the largest daily newspaper in Indonesia and (f) the Legal Research Center (*Pusat Pengkajian Hukum* or PPH) (a private non-profit legal research foundation). We have also had the opportunity to speak with members of the judiciary regarding their needs and desires in the area of legal information. Each of these organizations has undertaken substantial efforts to collect, categorize and/or disseminate basic legal information in Indonesia, each having a different emphasis and approach and, predictably, each achieving different results.

##### A. ELIPS Project

The ELIPS Project, working in conjunction with BPHN, has been successful in compiling and placing on CD-ROM all laws, regulations and other promulgations in certain fields of economic law, most notably, tax and capital markets. It has also placed the State Gazette (*Lambaran Negara*) and Minister of Finance regulations on CD-ROM. These compilations, however, are current only through the end of 1996 and updating efforts have not been undertaken by either ELIPS or BPHN, although PHI is continuing and expanding upon the work of ELIPS on a commercial basis. While the team was not charged with the responsibility of assessing the success or failure of the ELIPS Project, certain observations regarding its legal information component may be offered.

- **Technological issues.** West Publishing Company has made the decision to no longer support the *Premise* software system used by ELIPS in creating its CD-ROMs. Accordingly, to ensure continuing utility of the existing database, the CD-ROMs will need to be converted to a new software system (*Folio* software appears to have been chosen, although there is some concern that such software is too sophisticated for the modest needs and human resources of the government), and personnel expected to use the CD-ROMs will need to be retrained in the

new software. The team also heard some differences of opinion whether, at this stage, the continued use of CD-ROMs was the most cost-efficient technology to use for the intended purpose, or whether newer technologies such as the internet might be preferable. In any event, it appears uncertain at this time whether the CD-ROM program will continue within BPHN without further donor support.

- **Level of use.** Usage of the CD-ROMs in both the public and private sectors has been less than anticipated. According to BPHN, over 450 copies of the CD-ROMs containing the State Gazette and the Minister of Finance regulations have been distributed to the legal bureaus of all Government Departments, to State University libraries and to legal bureaus of each of the 27 provinces. Some have also been distributed to legal bureaus at the regional (i.e., *Kabupaten*) level. There is some question, however, as to how widely used the CD-ROMs are being used in the public sector. The public sector's lack of sufficient human resources and/or appropriate hardware, combined with traditionally weak research habits, may result in less than optimum use. The team was told that ELIPS plans to undertake a survey to determine the frequency and nature of current usage of the CD-ROMs.

The private sector has had only limited access to the CD-ROMs. The original CD-ROMs were not made generally available to potential private users (e.g., law firms, tax consultants, securities underwriters). Expanded and updated versions, however, are now available to the private sector through PHI, although sales are reported to be sluggish. This may be due in part to the relatively high cost for the products offered. For example, the combined Indonesian and English language CD-ROMs for tax are subject to an initial license fee of US\$ 4,925.00 and quarterly update fees of US\$ 995.00. PHI suggested that it has underestimated the amount of training it must provide.

- **Sustainability.** Although BPHN declares its interest in updating the existing CD-ROMs and even expanding coverage to include such items as reported court cases, treaties, and scholarly publications, there is no indication that it has the necessary budget to do so. Especially in light of the necessity of converting the existing CD-ROMs to a new software and retraining users throughout the Government, it is unlikely that funds will be found within BPHN's budget to continue this program.

## **B. PDH-UI**

The Legal Documentation Center of the University of Indonesia has long been in the forefront of systematizing available legal information in Indonesia. PDH-UI is separate, both physically and administratively, from the UI Law Faculty library. One major continuing contribution of PDH-UI is the publication of *Informasi Peraturan Perundang-Undangan R.I.* which catalogs and indexes laws, regulations, decrees, instructions and circular letters for all Central Government Departments and Agencies down to the level of Director General, as well as regional regulations and Governor's decrees and instructions for DKI Jakarta. This publication is available to the public for a modest fee. PDH-UI maintains three (3) separate "information centers," each of which suffers from limited human and material resources. The center in Menteng is probably the most heavily used due to its central location.

## **C. BPHN**

In 1989, BPHN's mission statement was redefined to include (i) development of a national legal system, (ii) planning of new laws, and (iii) development of a system of legal documentation. In the area of legal documentation, its performance to date has been modest.

Since 1978, BPHN has been the hub of the nationwide Legal Documentation and Information Networks System (SJDI), intended to be an integrated system of manual retrieval of legal documentation, linking BPHN with the legal bureaus of Central Government Departments and Agencies, Provincial Government legal bureaus and both public and private universities. Essentially, SJDI is an inter-library lending service. BPHN officials lament the lack of cooperation they receive from departments and agencies throughout the government in attempting to maintain SJDI as a complete and operational system. Although SJDI is mentioned in REPELITA VI (1993), BPHN officials maintain that its status is undercut by the fact that no Presidential Decree (*Kepres*) has been issued for purposes of providing it with a legal basis. As a result, BPHN is unable to obtain the cooperation it needs from the legal bureaus of the various government departments and agencies.

BPHN has also made strides toward using more modern information technology in an effort to meet its goals. It has, of course, been a primary recipient of assistance from the Legal Information Component of the ELIPS Project. As mentioned above, however, it has not demonstrated the ability (or perhaps even the willingness) to update the CD-ROMs produced by ELIPS without additional donor funding.

Additionally, BPHN has established a Bulletin Board System (BBS) available on-line to users with the requisite hardware and software. It is intended primarily for the members of SJDI, although according to BPHN officials, anyone with the requisite hardware and software can obtain access to it. The data in the BBS consists of full texts of recently promulgated laws and regulations. BPHN has also expressed an interest in establishing a home page on the Internet, but this appears to be in the early planning stages at this time.

#### **D. KOMPAS Information Centre**

Perhaps the most promising database of Indonesian laws and regulations observed by the team was that compiled by the Information Centre of *Kompas*. The *Kompas* database consists of all Laws, Government Regulations, Presidential Decrees, and Presidential Instructions issued since 1945. (It does not contain colonial era legislation.) It also includes all ministerial decrees, ministerial instructions, and ministerial circular letters issued since 1990. Finally, it includes regulations of DKI Jakarta as well as decrees, instructions, and circular letters issued by the Governor of Jakarta since 1990.

The database is on an intranet system, i.e., a system virtually identical to the Internet except that it is for internal use only by the journalists of *Kompas*. The system employs hypertext markup language (html) and uses the same browsers used on the Internet (e.g., Netscape and Explorer) making it easily usable by anyone familiar with those tools. The system has only recently been made available for internal use, but it is anticipated that *Kompas* will make it available to the general public in the not too distant future as it has done with other computerized databases. This is likely to be on a fee basis for on-line services.

The *Kompas* legal database is a wholly private-sector undertaking, and no particular role for USAID or other donor support is envisioned. It's importance is to understand the current (and near-future) state of legal information in Indonesia as an aid to formulating priorities.

#### **E. PPH**

PPH is an indigenous, private, non-profit organization which undertakes various activities in the area of law development, analysis and continuing education, with special emphasis on economic law. It publishes a quarterly newsletter containing scholarly articles on a variety of legal topics. It also holds periodic seminars and workshops to disseminate information and generate discussion regarding new

legal developments in Indonesia. Founded by Kartini Mulyadi, a leading private practitioner in Jakarta, its Board of Directors is headed by Bambang Kesowo, an influential member of the State Secretariat (SekNeg), and generally maintains good working relationships with various government departments which allows it access to advocate policy and other types of reform.

Through its publications, seminars, and workshops, PPH strives to bring a rigorous analytical methodology to discussions about legal topics of current interest, and is able to do so without creating a confrontational relationship with the government. Given the nature of its work, the professionalism of its approach, and the prominent individuals from both the private and public sectors associated with it, PPH deserves consideration as a counterpart in any one of a number of programs that USAID might consider, particularly those relating to legal information, continuing education, and/or clinical education for law students.

## **F. Judiciary**

The team heard a wide variety of opinions expressed regarding the extent to which judicial decisions are published and circulated, the willingness of judges to have their decisions published, and the value of expanding the quantity and quality of existing efforts in this regard. Currently, the Supreme Court publishes selected decisions, perhaps on an annual basis, in *Yurisprudensi Indonesia* (Indonesian Jurisprudence), and the Department of Justice on occasion publishes selected decisions of the lower courts in the *Himpunan Putusan-Putusan Pengadilan Negeri* (Compilation of Court Decisions). These publications are printed in limited numbers and offer no system of indexing or cross-referencing.

Notwithstanding that Indonesia is a Civil Law (rather than Common Law) jurisdiction, the conventional wisdom is that increased publication and circulation of judicial decisions would serve several beneficial purposes. Doing so would permit the courts and legal practitioners alike to understand the reasoning and principles used by the judiciary in interpreting applicable law, thus contributing to a consistent and predictable application of laws. Publication of judicial decisions would also have the effect of exposing (and hopefully reducing) faulty reasoning and the inconsistent treatment of similar cases within the court system.

It should be mentioned that several prior programs relating to the publication of judicial decisions have been undertaken in Indonesia with mixed results. Most recently, the team received unconfirmed information that the Dutch are currently funding a program relating to the publication of court decisions and/or headnotes of court decisions. Unfortunately, the team has been unable to identify the appropriate person(s) at the Dutch Embassy to provide confirmation and further details of this program. Any decision by USAID to fund a program relating to the development of case law in Indonesia should, of course, take into account the nature and scope of this Dutch initiative.

## **III. Possible Programs**

### **A. Legal Translation Program**

A recurring comment heard from many of the interviewees related to the combination of (i) a lack of English-language legal materials available in Indonesia for use by Indonesian faculty, students, and practitioners and (ii) the relatively low level of English-language skills of the legal profession as a whole. The typical response to solving this perceived problem was to require students to learn more English. Another approach, however, may hold more promise.

As Indonesia moves with the rest of the world toward a fully globalized system of trade in goods and services, the demand by Indonesia's trading partners for knowledge about Indonesian laws and

regulations will increase as will the external pressures felt by Indonesia to comply with international standards in the commercial, financial, environmental, and other spheres of activity. These developments could be spurred on by (i) increasing the availability of Indonesian laws, regulations and authoritative commentaries in the English language, and (ii) translating selected American (or perhaps Dutch) legal texts into the Indonesian language. Making such basic source information available to both Indonesian and foreign legal scholars and practitioners would allow for greater mutual understanding of the issues facing the Indonesian legal system at the start of the 21st century, and would lead to more open and meaningful dialogue on how to address those issues.

Initially, such a program would require a proven Indonesian counterpart, willing and able to undertake the management of such activity. PDH-UI and PPH are two obvious candidates, but there are certainly others. Items to be translated would need to be selected, with an emphasis on practicality and avoiding duplication of effort. Input from the Consortium of Indonesian Law Schools might be of assistance in this regard. The basic translation work could be accomplished by law students, perhaps even as part of a clinical education component of their curriculum, or by recent law faculty graduates. (A side advantage to this program would be the improvement of technical language skills in the participants.) Editing would of course be carried out by senior scholars or practitioners. Ideally, sales of translations to law schools and practitioners could produce sufficient revenues to allow this program to become self-sustaining within two years or so after start-up.

### **Impacts**

- More foreign language legal materials would be made accessible to law faculty, students, and practitioners in Indonesia, leading to increased understanding of international standards of rule-based conduct.
- More Indonesian language legal materials would be made accessible to foreign faculty, students, and practitioners with an interest in Indonesia, leading to more meaningful dialogue on how improvements can be effected.
- Students and graduates providing the initial translations would develop increased language skills, particularly in legal expression and terminology.

### **Time Frame**

Given the length of time that the preparation of quality translations require, one year would probably be an insufficient time period for purposes of evaluating the success or failure of such a program. An initial two-year commitment would be more appropriate.

### **B. Development of Indonesian Case Law**

The rationale for improving the case law system in Indonesia is briefly summarized above in Section I.F. Even assuming acceptance of that rationale, however, it must be recognized that the impact of expanded publication and circulation of judicial decisions would be long-term and difficult to measure. Nonetheless, a judiciary held publicly accountable for its decisions is one of the marks of a developed legal system, and many would argue that steps taken in this direction are critical in the establishment of a truly rule-based system of law in Indonesia.

Several programs in the past, and perhaps a current Dutch-funded program, have focused primarily on printing and circulating judicial decisions. One area that has generally been neglected, and is much-needed, is the indexing and/or categorization of decisions already published. To the extent

published case law in Indonesia exists, and it is believed that the aggregate amount is not insubstantial, there is still no easy way of researching how the courts have behaved when faced with a particular type of issue. Specifically, there is no existing system of headnotes, cross-references, or indexing. In this vacuum, even a relatively simple step such as publishing compilations of particular types of cases, e.g., intellectual property, banking, maritime, etc., would be helpful. Such a project could, conceivably, be undertaken by PDH-UI, PPH or perhaps even BPHN.

More effort would be required to define the details of such a program, but initially it would consist of compiling, categorizing, and/or cross-referencing all available case law in Indonesia. To accomplish this, it may be first necessary to create a database of Indonesian case law to facilitate search and cross-referencing functions. As with the proposed legal translations program, much of the work could probably be carried out by Indonesian law students or recent graduates. Given the relatively few cases that are published each year in Indonesia, once the existing library of case law is systematized, relatively minor efforts would be needed to sustain the program.

### **Impacts**

- Published case law in Indonesia would become more “researchable,” by scholars and practitioners alike, including litigants attempting to gauge their likelihood of success in a particular matter.
- Increased accessibility to the judicial thought process through categorization, indexing, and/or cross-referencing would enhance all the salutary benefits of the publication of judicial decisions, i.e., improvement of predictability, consistency, and logic of judicial behavior.

### **Time Frame**

Depending on the exact scope of the program identified, the time frame for the initial effort to systematize existing case law would probably be one to two years. Any measurement of the impact of such a program, however, would be difficult to make with any degree of certainty and, in any event, would be in the nature of a long-term contribution to the development of a rational legal system in Indonesia.

### **C. Continued Cooperation with BPHN**

Given the experience of ELIPS in working with BPHN and the interest of USAID in exploring ways to work directly with government agencies in the area of legal development, it is appropriate to discuss the possibility of identifying programs that would allow continuing cooperation with BPHN. The conclusion of the team, however, is not especially optimistic. While it is clear that much work in the area of collecting and categorizing laws and regulations remains to be done, and that BPHN is the government agency designated to take the lead role in this regard, it is questionable whether BPHN is currently up to the task.

Despite its knowledge that the ELIPS Project is being phased out in the near future, BPHN apparently has no action plan for the continuation (much less expansion) of the databases created to date. Given that the existing CD-ROMs will have to be converted to a new software application, it is unlikely that BPHN will have the budgetary funds even to do the necessary conversion and conduct the necessary retraining of users, much less to update and expand that effort. While several reasons may be advanced to explain this lack of initiative on the part of BPHN, one glaring problem facing BPHN is lack of funding. Particularly in light of the economic crisis in which Indonesia finds itself, there can be no reasonable expectation for funding of expanded activities within BPHN in the next fiscal year.

A frequently stated (though not universally agreed upon) assumption heard by the team is that there is a market in the private sector for faster and more comprehensive legal information. In principle, it would seem that BPHN would be in a perfect position to create, publish and sell authoritative compilations of laws and regulations to the private sector, thereby generating much needed funding for its activities. Unfortunately, Indonesian law prohibits government entities from selling copies of laws, regulations, and other public documents. As a result, BPHN is not in a position to profit from its own efforts by marketing its own work product to the private sector and must continue to rely on funding from the central government and foreign donors.

One possible approach to help alleviate the budget constraint is the formation of a not-for-profit foundation (*yayasan*) or cooperative (*koperasi*) in conjunction with BPHN to act as a sort of marketing agent for work product created in whole or part by BPHN. While the details of such an arrangement would have to be carefully considered, the basic idea would be for the agent to publish and circulate legal materials obtained from or thorough BPHN and, in return, to provide BPHN with resources (perhaps on an in-kind basis) that otherwise would be beyond the ability of BPHN to secure. Although such idea has the support of BPHN, the team is unable to form a judgment at this time whether such a project would be viable from financial, administrative and political points of view.

Without such a new direction, it is difficult to see how any program with BPHN would achieve the necessary momentum to carry it forward as a self-sustaining effort once donor funding came to an end. This discouraging conclusion is perhaps best supported by the lack of responsiveness of BPHN in respect of continuing the ELIPS legal information program.



## **ANNEX F**

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### **STRENGTHENING LAW SCHOOL PROGRAMS**

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## ANNEX F

### STRENGTHENING LAW SCHOOL PROGRAMS

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#### A. Background

Despite some modest reform in recent years, Indonesian legal education remains plagued by a plethora of problems. The Consortium of Law Schools, which has an official advisory capacity with the Department of Education, introduced a national core curriculum in 1993 that aims in part to upgrade legal skills training. According to the Dean and several faculty members of the University of Indonesia (UI) Law School, part of this reform defined as “clinical legal education” those courses that acquaint students with “real law experience.” Yet the team’s discussion with these professors indicated that such experience does not include any practical exposure outside the classroom. And it is unclear how much teaching methods have changed in the process.

Judges and practicing lawyers now teach these clinical courses, which consist of civil procedure, criminal procedure, alternative dispute resolution (which in the Indonesian legal lexicon does not include arbitration), legal drafting (as in drafting laws), and contract drafting. Students must take three of the five to graduate. Yet the UI professors report that these practicing legal professionals revert to a theoretical orientation in their teaching. So, in addition to the lack of practical exposure, even the teaching method lacks a practical approach.

The team’s specific findings correspond with the BAPPENAS diagnostic assessment’s more general conclusion that “the quality of new law graduates is still disappointing as they have no practical know-how to apply their theoretical knowledge.” The diagnostic further states that “the style or method of teaching in many law schools still leans too heavily on mastery of rules as rules (black letter law) rather than as illustrations of principles.” Combined with a stultifying lecture method of instruction, this approach results in students only having a “very abstract conception of what the law is or ought to be and what the direction of justice should be” and the continuing reality that “legal subjects are taught in a dull manner and do not try to illuminate the workings of society and the clashes of social, economic, political and philosophical values implicit in legal rules.”

One important contributing factor here is the lack of practical experience on the part of many law lecturers. But it seems that even such experience does not translate into a stimulating approach when actual practitioners teach.

Another shortcoming of legal education pertains to the lack of ethical training. Though there are many honorable exceptions to the rule, the fact is that the ethical orientation of the legal profession leaves much to be desired. Some of this is culturally grounded, in that practices that are legitimate in other contexts within the society tend to undermine a rule-based legal system. But an unethical orientation may also stem from law school itself, where students begin to learn informally the “tricks of the trade,” or at least are not trained to think ethically.

The diagnostic assessment tends to confirm this. Its illumination of law schools’ inability to expand students’ perspectives also raises the issue of professional ethics. Though not addressed in the context of legal education, the study does highlight the widespread problems with the lack of legal ethics in the practice of law. In fact, it is noteworthy that the rather cautious diagnostic delves into ethical issues to a great degree.

We should note that the assessment team has had somewhat limited interaction with individuals in a position to assess or inform us of the state of legal education at public universities. The full team's

contact consisted of the one aforementioned meeting at UI. In addition, the team leader met with the former legal education advisor under the ELIPS project who was visiting Jakarta for a week and some members of the team met separately with three senior members of the UI law faculty--two of whom had been Deans of the faculty and one of whom is the head of the Consortium of Law Schools--and with the Dean of a private law school in Jakarta. These latter meetings covered topics broader than just legal education. Unfortunately, the meetings could not be arranged during the time in which the member of the team with most experience in legal education was in-country.

A few individuals within and outside the NGO community have provided information on informal placement programs through which students at a few schools receive practical exposure through the legal services of the LBH. But such programs are exceptions to the rule and are not integrated into any law school's curriculum. They are not institutionalized.

We also note that the BAPPENAS diagnostic's recommendations pertaining to law schools are limited in some respects. It focuses on "technical fixes" for the shortcomings in students' preparation. Yet while its analysis notes that legal education fails to address the "workings of society and the clashes of social, economic, political and philosophical values implicit in legal rules," it suggests little in terms of addressing this deficiency. Nevertheless, some of its primary recommendations include:

- Special education for law graduates who want to be judges, public prosecutors and lawyers
- Transferring the supervision of legal education from the Consortium of Law Schools to a proposed Legal Professional Education Accreditation Board, which will have responsibility for such matters as upgrading curricula and faculty recruitment standards
- Supporting training in doctrinal and socio-legal research
- Supporting implementation of the 1993 curriculum through faculty training workshops and evaluation conferences
- Otherwise upgrading faculty and student knowledge through training on such subjects as economic law (which builds on the ELIPS project) and the English language skills that are increasingly important for commercial law practice
- Encouraging law schools to focus on the legal problems that women face due to legal constraints;
- Supporting clinical legal education as a mechanism for preparing students for legal practice

## **B. General Justification for a USAID Focus on Law Schools**

The following discussion presents two areas which might be further explored for possibilities for mission support. However, because the impact of such activities is not likely to be felt in the near term and will be very limited if not carried out within a broader program of legal reform, the assessment team did not agree that they should be pursued at this time. Furthermore, in any such further exploration it will be necessary to address the challenges presented by faculty resistance to new modalities of instruction, the requirements for financing, and the need to identify and guide the participation of law firms and NGOs in the development of university training.

The particular opportunity presented by potential USAID work with law schools is that it would allow the mission to engage with state-supported institutions while enabling it to adopt the flexible approach necessary for operating in an unpredictable programming environment. On a sector level the

activities would presumably work with the Consortium of Law Schools, or directly with the Department of Education itself. Some potential activities might involve coordination with individual law schools in ways that do not require Department approval. The UI faculty members inform us that beyond the common core curriculum prescribed by the Department, law schools have considerable curricular leeway. Of course, such leeway still hinges on the willingness of various parties within a law school to undertake new initiatives. This potentially thorny issue is discussed in greater detail below. But if found in at least a few law schools, such "political will" provides the opportunity to try different approaches, depending on the needs and preferences of these institutions.

Law schools also might prove a fruitful focus because their leadership and faculties could be less subject to turnover than government ministries, and their budgets and operations do not appear to be subject to manipulation by the political system. On the other hand, we have been advised that faculty politics can be just as problematic as the bureaucratic politics found in government. Deans are not above playing favorites regarding professors selected for training and overseas exposure, and the need to juggle factions within faculties is a political problem all Deans face.

Finally, the advantage of a law school-focused program is that it concentrates resources on the future of the legal profession, rather than those segments already set in their ways. Experience in other Asian nations (e.g., Bangladesh, Nepal, Philippines) indicates that law students constitute the component of the legal community that is most open to new knowledge and perspectives regarding legal practice.

### **C. Potential Law School Initiative I: Clinical Legal Education as a Mechanism for Building a Public Interest Law Movement**

Of the many approaches open to the mission with respect to law schools, the fostering of clinical legal education would seem to deserve particular attention. It represents a strategy that might combine substantive education (regarding, for example, economic and gender issues), practical skills development and ethical training for students. The last must be a crucial element of any legal education approach for in its absence the mission will fail to address the underlying influences that undermine the effective use of technical expertise.

Clinical legal education also merits exploration because it has the clearest track record of success in these regards elsewhere in Asia: notably Nepal, Bangladesh, and the Philippines. This track record testifies to ways in which it could include training in socio-legal and doctrinal research. More specifically, experience in other Asian nations and even the United States demonstrates that clinical legal education can play a crucially formative role in exposing students to progressive opportunities and perspectives that they otherwise would not have. This role takes different forms in diverse societies. In Bangladesh, it stems from a concerted donor effort to build a public interest law movement centered on NGOs but backed by the mainstream bar. In the Philippines, a combination of informal programs and donor support has fueled the growth of a legal services community that has adopted a variety of sophisticated and nuanced strategies for influencing policy formulation and implementation.

Quite obviously, Indonesia is unique in many respects. And its legal services community has lessons of its own to offer other nations' lawyers. Still, to sustain this community, build practical skills, and explore ways for a new generation of lawyers to adopt new strategies in response to potential opportunities, clinical legal education could be a place to start.

We should be clear about what such a clinical legal education initiative would and would not aim to accomplish. It would not be an attempt to revamp the entire Indonesian legal profession. Rather, a successful initiative would have a modest impact on practical and ethical training for future lawyers at selected leading law schools. It would engage some of them in clinical work that would expand their

horizons about fellow citizens' legal needs. This could in turn stimulate the Indonesian equivalent of pro bono work by them down the line, and/or greater mainstream bar support for the activities of legal services organizations and other NGOs as today's students become tomorrow's leaders. It might also spur replication by other law schools.

More narrowly but fundamentally, a successful initiative could provide a model for lawyers inclined toward legal services work, but who otherwise would not have opportunities to explore its possibilities. This could in turn deepen and broaden the prospective talent pool of legal services groups and the broader NGO community.

The longer term effects are more difficult to predict, of course. They could include replication at law schools not touched by the initiative, as suggested above. They also might involve a new generation of attorneys adopting more sophisticated advocacy strategies, through current or new NGOs. Building on current Indonesian or regional experience, such strategies could include ways of cooperating with government agencies, if and when such agencies become more amenable to cooperation.

An important advantage of this approach is that it directly relates to the current thrust of SO5. At the same time that it strengthens legal education in terms of both technical skills and ethical orientation, it contributes to a new generation of public interest lawyers bringing new energy and ideas to the country's NGO community. Furthermore, to the extent that NGOs address land disputes, consumers' rights, women's rights and other community-level issues--or that they will more successfully address them in the future, partly as a result of how clinical legal education will fortify their efforts--they plant the seeds for grassroots economic progress. A recent World Bank report, for example, highlights how violence against women negatively affects development. Similarly, NGO policy level impact on such fields as the environment can yield economic benefits (or prevent economic harm) down the line.

What stages and facets would this clinical legal education initiative feature?

1. Initially, the mission would need to conduct intensive interviews with NGOs and law faculties to determine the feasibility of a program that would blend practical training with (primarily) NGO placements. The team did not break much ground in this regard because: its very limited law school contacts were confined to Jakarta, for most of its assignment the team was instructed not to deal with NGO-focused work, that step was considered to be part of a possible future design process. Nevertheless, our interview with UI professors revealed a dynamic core of junior faculty who could drive such an initiative and a dean and selected senior faculty who might be supportive. Other contacts suggest that at least a few other law schools might offer similar programming opportunities.

The in-house mission assessment proposed here would focus on identifying the strengths and weaknesses of similar programs with university students in the past; NGO interest in hosting law students; the presence of faculty (especially energetic junior faculty) eager to take the lead; the interest of law school leadership in supporting this work; the potential opposition from other faculty members or interested parties; and the extent to which the law schools in question already have even the most rudimentary clinical legal education efforts under way. It also would need to ascertain which law schools are the best candidates for this program and the level of resources the mission could commit to it.

2. If the mission became convinced that there is sufficient potential for the project to achieve the results described above, it would award a contract to a NGO, law school, or commercial firm with appropriate experience.

3. The contracted entity would of course structure the details of the project as it and the Mission see fit. But it could include arranging for one or more foreign consultants to train and/or demonstrate

for Indonesian faculty appropriate teaching methods; prepare relevant course materials; and help to arrange and monitor internships.

4. Regional exposure should be part of the program. Nepal, Bangladesh, India, the Philippines and quite possibly other countries could provide Indonesian junior faculty and law deans with examples of the prospects and problems of building clinical legal education programs. The foreign consultants should be involved in such regional tours. Unless they bring a surprisingly diverse range of regional experience to the table, they would likely benefit from the exposure as much as the Indonesians.

5. The classroom components of the clinical programs should serve at least three purposes. First, they should provide law students with practical grounding in legal skills. Hand in hand with this, they should demonstrate appropriate teaching methods to faculty. Finally, but crucially, they should integrate such grounding with consideration of ethical issues and substantive laws pertinent to legal services practice.

6. The internship arrangements could vary according to the preferences of the law schools and the NGOs. They need not be the same across the board. In fact, for the sake of experimentation they should vary to some extent.

Other countries' experiences offer many variations on the theme of internships and related arrangements. One "immersion" approach would place students in a rural setting for a brief period (from a few days to a week) prior to the internships. This step need not involve legal work. Rather, it would be designed to expose students to the daily lives of low income Indonesians. These brief immersions could be arranged by NGOs, though they need not be legal services NGOs.

Some internships could take place during semesters. Under many circumstances, though, they might be best arranged during the breaks between academic years. Such internships also might benefit by placing Jakarta-based students in provincial areas, and vice versa.

In any event, the students' concurrent or subsequent clinical classes should provide them with opportunities to reflect and build on their experiences. Writing papers on legal issues they handled would be one vehicle.

Finally, especially promising participants could be supported for one-year internships with legal services NGOs and other advocacy NGOs after graduation. They might also benefit from regional exposure to leading legal services NGOs in neighboring countries.

7. Mission funding for this effort would hinge on how many law schools and clinical placements were involved. But it should cover the costs of the foreign consultants, regional tours, student stipends, related domestic travel and materials. It also could include follow-up training and other costs relating to encouraging replication of clinical legal education programs in other law schools.

8. If at all possible, law school counterpart support should consist of junior faculty salaries and the use of law school facilities.

#### **D. Potential Law School Initiative II: Clinical Legal Education as a Mechanism for Building Practical Skills**

A clinical legal education initiative that focuses on practical skills and experience would be broader or more diffuse than the strategy sketched above, depending on how one wishes to characterize their differences. It would depart from Potential Law School Initiative I in certain respects.

1. Because this version of the initiative would not concentrate on fortifying the NGO community, it could include more of an explicitly economic focus in its classes and internship placements. NGO placements and the substantive issues they reflect would still be included. But the central focus would be on building skills, rather than a public interest law movement. The two are not mutually exclusive. It is a matter of emphasis.

2. If the mission were to go this route, it would face the additional challenge of finding suitable economic law internship placements for students. Law firms might be appropriate. But whether they are prepared to take in students through a clinical legal education program is another matter. Conversely, the Mission would need to ascertain the extent to which there are firms that could provide models in terms of both practical training and ethical approaches to legal practice. Past experience with this type of placement in Indonesia has not been very positive because law firms either did not know how to use students effectively or were only interested in getting onerous tasks accomplished at low cost. Furthermore, the firms usually insisted on choosing the students themselves and did not seek any coordination of efforts with the faculty. Thus, the faculty of UI is cautious about endorsing a new effort and will not favor granting credit for such experiences until satisfied that acceptable parameters have been established.

3. If the mission did decide that a broader focus could work effectively, it still would identify an experienced organization to coordinate the effort. But the nature of the foreign consultants and the regional tours might differ, to accommodate that broader focus and the economic law elements it contains.

4. The overall advantage of this approach is that it allows the mission to explicitly address both SO 1 and SO 5. On the other hand, the focus is not as tight as one that aims to enhance the future legal work of Indonesian NGOs. Further, the approach only weakly addresses ethical and public service constraints on Indonesian legal practice, and its relationship to SO 5 suffers as it tries to support SO 1 as well.

5. A third type of placement might conceivably involve government agencies. But government employment is held in increasingly low regard by law students according to a number of sources, including professors at UI. There is the ethical dimension to take into account as well. A clinical legal education initiative should not rely at this time on such placements as a major component of its activities.

**ANNEX G**

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**POLITICAL WILL**

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## ANNEX G

### POLITICAL WILL

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Determining the degree of “political will” of the Indonesian government to support activities carrying out legal reform was the primary task of the assessment. Since the differences of opinion of the members of the team concerning whether there was sufficient political will to justify going forward with further exploration of particular activities appear to be based in part on different understandings of what is meant by “political will” a fuller discussion of that concept would appear to be useful.

#### **I. Contextual Approach**

The following is a statement of the thinking concerning political will which lies behind the contextual approach.

Political will is not simply the commitment of top leadership (in this case, President Suharto) to legal reform. It also involves positive engagement by key figures in the relevant institution(s) and cooperation by lower level officials responsible for actually implementing reforms. In the absence of any of these, government-centered assistance is very likely to falter. In certain instances, sustained pressure from the top can overcome mid and lower level resistance or indifference. Whether that combination of circumstances can be obtained in Indonesia is discussed below.

**Policy guidance.** Those on the team who conclude that political will is absent draw on the official policy guidance from USAID; a range of documented development experience and scholarship, particularly with respect to Asia; a political economy analysis that places Indonesia in the context of that documentation; and specific evidence that came to light in the course of the assessment.

USAID’s principal policy guidance concerning work on the rule of law is *Weighing in on the Scales of Justice: Strategic Approaches for Donor-Supported Rule of Law Programs*, a 1994 report prepared by the Center for Development Information and Evaluation (CDIE). The study sums up Rule of Law (ROL) development experience by eschewing what it labels the “technical fix” or engineering approach” inherent in government-centered law projects. It instead favors “an ... approach that leans heavily on the insights of political economy and emphasizes constituency and coalition building.” It does not support activities just because they might be carried out.

Another source of policy guidance is a 1994 Information Memorandum for the USAID Senior Staff from the Agency’s Rule of Law Working Group. It identifies a number of factors as central to demonstrating political commitment to reform:

**Factor 1:** Judicial independence from other branches of government, political parties and/or military or police.

**Application to Indonesia:** Few would argue that the Indonesian judiciary is significantly independent. Nothing in the team’s research contradicted this general impression regarding the lack of independence. The 1996 Democracy Assessment notes that the judiciary “continues to be subject to significant executive control.”

**Factor 2:** Perceived honesty of judicial personnel and accountability within the system.

**Application to Indonesia:** Honesty and accountability are not considered hallmarks of

the Indonesian legal system. Independent observers interviewed by the team, as well as a former Supreme Court justice, confirmed this.

**Factor 3:** Level of resources provided to the justice system overall as compared to other budgetary requirements such as military spending.

**Application to Indonesia:** The level of resources for the justice system is low, with no prospect of a significant increase, particularly in contrast with military spending.

**Factor 4:** Degree of support for reform among elite groups such as supreme court magistrates, legislators, and executive branch officials.

**Application to Indonesia:** While there may be isolated exceptions, such elites in Indonesia generally are not associated with reform. As already noted, the integrity and independence of the judiciary (including its leadership) are not features in which independent observers place great faith. As implied by the 1996 Democracy Assessment, the legislature's potential to lead the way for ROL reform is minimal, given that "it does not represent the will of its members, who are merely witnesses to decisions made elsewhere." The executive branch clearly is more significant, but also more vested in arrangements that maintain its members' bureaucratic, political, and/or financial power. Most independent observers strongly doubt its overall commitment to reform. True, it has acceded to tremendous international pressure for macroeconomic policy reforms. But this is less important than its initial resistance which demonstrates a lack of high-level commitment to overcoming bureaucratic indifference or opposition to the modest, lower level reforms and initiatives that the Mission might seek through a government-centered program.

The third policy guidance document, "Technical Annex C: Democracy," aims to "assist USAID personnel in identifying democracy-sector strategic objectives and in formulating action plans that incorporate democracy sector projects in sustainable development countries." It identifies three additional factors that should be taken into account in determining "the existence of requisite political will in the host country, [which is] particularly important where a program is directed at a government entity":

**Factor 5:** "[H]ow open the government is to allowing and promoting participation by the nongovernmental sectors."

**Application to Indonesia:** Grudging participation is allowed to a limited degree, sometimes due to outside pressure (as in the environmental sphere). But this does not reflect openness, and it certainly does not suggest that the government promotes participation.

**Factor 6:** "Financial, personnel or organizational changes" the government will undertake.

**Application to Indonesia:** Unclear at best.

**Factor 7:** "Specific legal or institutional changes (including, in the case of governments, accession to international human rights instruments)" the government is willing to undertake.

**Application to Indonesia:** Unclear at best.

The upshot of this review is that both the CDIE report's general guidance and the other

documents' more specific criteria weigh heavily against a government-focused initiative in Indonesia at this time. Of the seven factors identified here, the first five clearly fall into the negative column. Strong cases could be made for including the last two in that category also. Of course, there is the clear lack of accession to international human rights instruments. But even putting this aside, recent government macroeconomic policy reforms that responded to intense international pressure do not evidence a willingness to see through whatever modest initiatives the mission might introduce. In fact, initial government attempts to resist and evade such reforms are more telling regarding the prospects for a government-focused USAID ROL project.

**Non-USAID research and assessments.** Outside scholarship and studies also weigh in favor of a contextual approach to ascertaining political commitment to reform. Some reach back twenty years to the Law and Development Movement, in terms of in-depth critiques by Gardner, Galanter and Trubeck. More recently, however, a 1993 General Accounting Office report, *Promoting Judicial Reform to Strengthen Democracies*, offers general ROL development insights that accord with CDIE's aforementioned policy guidance: "addressing technical problems without confronting the political and institutional obstacles to reform is usually not productive" and imposing reform on a country that is not "receptive to change is generally ineffective and wasteful."

Former State Department attorney Thomas Carothers, who was deeply involved with the Agency's Latin American Administration of Justice Program, makes a similar but more powerful point in his 1991 book, *In the Name of Democracy*. Implicitly commenting on efforts to perceive political will where it does not exist, Carothers asserts that assistance oriented toward governmental legal institutions "tends to ignore the profoundly antidemocratic underlying political and economic structures...and to focus on modifying institutional forms that are often of peripheral importance in real terms."

A final but fundamental point regarding political will is that even where it can be located on an isolated institutional level, this does not translate into effective programming. Technical Annex C suggests this in emphasizing that "focusing on a manageable number of objectives...is critical, and limiting those activities that are most likely to accomplish the broad development objectives is fundamental." Isolated work with a given institution may bring about limited changes that have no ultimate impact on justice, due to the persistence of a host of other barriers.

**Reality of GOI commitment to legal reform activities.** In reaching the above conclusions, however, the team members that perceive a lack of political will do not simply rely on considerable Agency policy guidance or insights provided by the very useful 1996 Democracy Reassessment. They also place considerable importance on the team's interviews with government officials at various levels of authority. And they place these interviews in the context of comparative development experience.

As noted at the outset of this section, political will is not simply a matter of the commitment of the highest echelons of a polity. Some lower level officials also must be engaged and dedicated to reform. Yet team interviews with government personnel revealed a paucity of specific ideas and enthusiasm. It may not be the "Indonesian way" to be forthright in such discussions. But field work in eight other Asian nations and many more around the globe—including several where communication is not nearly as direct as in the West—provided team members with bases for assessing whether sparks of specific interest and commitment exist. Even in societies where communication is guarded and indirect, committed government officials manifest at least a limited measure of specificity, engagement, or intellectual ownership in discussing project ideas. In fact, such grantee engagement is fundamental to any development project. And even where it exists, it is only the first hurdle in assessing whether a project is feasible. But with the possible exception of one individual who was in no position to act on the ideas discussed, the team's interviews did not get past this threshold consideration.

USAID's comparative Asian experience also provides pause for reading political will into vague

comments or ambiguous (at best) expressions of official commitment. USAID consideration of and investment in government-centered ROL projects has come and gone with little impact in Bangladesh, Cambodia, Nepal, Pakistan, Philippines and Sri Lanka over the past decade. The reasons such projects have failed vary widely: endemic corruption and underlying legal culture in some cases; the departure of a key official (with no concomitant commitment by that person's replacement and subordinates) in others. The team encountered no evidence that would support viewing Indonesia as an exception to this rule. In contrast, NGO ROL activities of the general type funded in Indonesia have yielded considerable success on policy and/or community levels in those Asian nations where the Agency has supported them in a sustained manner.

## **V. Relation of Particular Activities and Their Setting**

Even assuming that particular activities could be carried out, their impact on the performance of the legal sector is likely to be very limited in the Indonesian environment unless there is effective government support for a broader legal reform program. Furthermore, the lack of concrete plans for carrying out reform activities and of highly motivated and effective proponents of the activities currently within the government call into question their feasibility, and their design and implementation would seem to require more time of experienced personnel than the Mission is likely to be able to devote to the program.

For instance, further work on legal information (following on or independent of the ELIPS Project) might not be blocked by high level opposition or lower level intransigence. But the fact that such work is **possible** is quite distinct from the prospect of it being **successful**. Government agencies' extreme reluctance to share information generated by that project weighs heavily against follow-up funding. The underlying influence of rent-seeking behavior and bureaucratic control will not be addressed by a follow-up government-centered project. And if such agencies were truly dedicated to information dissemination, the team and/or Mission should have heard carefully articulated statements regarding what they want to do in the future.

The prospects for a successful legal information project appear dim in view of the Asia Foundation's experience with an extended effort to publish Supreme Court decisions. In and of itself, the fact that the Foundation had to cancel the grant is noteworthy. But the Court's reluctance to disseminate its decisions is but the tip of the iceberg in terms of obstacles to the project's success. Such success would not hinge on whether the decisions would be published. Rather, it depends on whether such publication would have any impact on Indonesian justice. Justice in other Asian nations has not benefitted from supreme courts putting decisions in writing. In fact, the case could be made that it slows down already glacial judiciaries' operations even further, without improving the substance of opinions or addressing the underlying corruption, patronage and/or political control that often shape them.

In the Indonesian context in which top level and bureaucratic political will appear to be lacking, government-focused projects are unlikely to move Indonesia or the Mission toward the kinds of results the USAID legitimately seeks. The passage of a law or the introduction of a legal education program are not the same as the implementation of that law or the improvement in legal practice.

## **II. Pockets-of-Opportunity Approach**

The following is a statement of the thinking lying behind the pockets-of-opportunity approach.

There is no need for more concrete evidence of political will at the very top echelons of the Indonesian government before embarking on any government-partnered legal reform project since there already are strong indicators of general government support for legal reform. The question of whether

there is political will is really one of whether there is evidence of consensus and support within the GOI for specific activities of reform or, phased differently, whether there are pockets of opportunity within particular government agencies or bureaus for specific reform or development efforts.

**General support for legal reform.** While there is no evidence to suggest that the Indonesian government will embark on a campaign to improve and strengthen its legal system generally, there is wide acknowledgment—including from cabinet level officials—that Indonesia’s legal system is underdeveloped, ineffective and sorely in need of modernization and human resource development. Furthermore, there is evidence that the government supports legal reform. For instance:

- Inclusion of a separate chapter on law in the current five-year plan.
- Expectation that equal or greater significance will be placed on law development and reform of the legal system in the up-coming five-year plan and that that plan will continue the work begun under the current five-year plan.
- Creation of the position of an Assistant Minister for Legal Development within BAPPENAS.
- Initiation, preparation and circulation of the BAPPENAS diagnostic assessment—which is a significant effort to identify specific areas and programs for possible implementation—and the September 1997 seminar relation thereto.
- On-going efforts by BAPPENAS personnel to follow up on the diagnostic assessment with the issuance of an action plan intended to specify priorities and outline the planned implementation of at least some recommendations contained in the diagnostic assessment.

The government’s support for legal reform is likely to be further strengthened by the external forces that are pulling Indonesia into a global system characterized by increasingly integrated and standardized norms of conduct in commercial, financial and legal matters. More than one interviewee predicted that, due in part to the impact of globalization, the next few years in Indonesia’s history would be no less a turning point than the 1965-67 period, and in that context predicted the inevitability of further legal reform. According to this view Indonesia will have no choice but to move toward a system based on rule of law and away from one based on power, wealth and other means of influence. Many interviewees commented that the current economic crisis will induce changes in the regulatory structure of Indonesia’s banking and financial system. Thus the time may well be ripe for reform measures throughout broad sectors of the political-economic-legal system of Indonesia.

**Support for particular activities.** Lastly, while no consensus may exist on what specific improvements are necessary or on the means and mechanisms to initiate and implement improvements, this does not mean that there would not be government support for particular activities. The absence of concrete plans for reform are largely due to the extreme deference paid to the chief executive but do not mean that the government would not be receptive and supportive of suggestions for reform activities. Indeed, there are progressive, legal-reform minded individuals scattered throughout various government departments whose efforts could well be supported. Given the nature of Indonesian culture, which places significant reliance on the importance of personal relationships, successful program implementation may be possible when working with the right persons on a discrete, well-defined project.

The particular activities identified by the assessment team for possible further exploration meet most of the criteria for eligible projects set out in the scope of work as elaborated upon by the mission during the course of the field review. Furthermore, except for the passage of a new arbitration law, none of the activities identified for further consideration would require any greater expression of willingness and support on the part of the government than already exists. Indeed, none of the activities

identify an Indonesian government entity as the most appropriate counterpart to carry out the activity. The exception is BPHN (an agency within the Department of Justice) which could be considered a candidate for at least one of the activities described in the area of legal information.

